now in use, or any other form of motive power to be substitued therefor, or used in connection therewith; and the party of the first part hereby authorizes and consents to the maintenance of the said structure and the operation of the said railroad through the said street and past the premises hereinbefore described, by the parties of the last part, their successors or assigns forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the party of the first part, caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated, except that the parties of the last part and their successors or assigns may at any time hereafter use, in the operation of their railroads, electricity or any other motive power, and may also make such repairs to or alterations in the present structure as they may deem expedient; provided, however, that in no case shall said structures, or the operation of trains thereon be changed, enlarged or added to, so as to materially increase the encroachments upon the easements hereby released and conveyed or the existing burden upon the abutting property hereinabove described.

And, the said party of the first part covenants with the parties of the last part as follows:

First: That the said covenantor is seized in fee simple absolute of the said easements and has good right to convey the same.

Second: That the parties of the last part shall quietly enjoy the said easements.

Third: That the said easements are free from

encumbrances, except four certain mortgages given to secure payment of the aggregate sum of $2,850,000.00, and Judgments J. B.

Fourth: That the said covenantor will execute or procure any further necessary assurance of the title to the said easements.

Fifth: That the said covenantor will forever warrant the title to the said easements.

In Witness Whereof, the party of the first part has caused these presents to be signed by its President and caused its corporate seal to be hereto 4964
affixed this the day and year first above written.

The Forty-second Street Manhattanville & St. Nicholas Av. Railway Co. by John Beaver, President.

Sealed and delivered in presence of Henry A. Robinson (LS).

State of New York, County of New York, ss.:

On the 28th day of October, in the year one thousand nine hundred and one (1901), before me personally came John Beaver to me known, who, 4965
being by me duly sworn, did depose and say that he resided in Borough of Manhattan, New York City; that he is the President of The 42nd Street, Manhattanville and St, Nicholas Avenue Railway Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

Thos. J. Reilly, Notary Public, New York County.

4966 *Claimants' Exhibits.*

Claimants' Exhibit "J-3"—Conveyance and Release, Manhattan Storage & Warehouse Co. to N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas, The Manhattan Storage and Warehouse Company, a corporation organized and existing under the laws of the State of New York, acquired title in fee simple to certain premises hereinafter described by deed dated March 13, 1882, and ever since said date has been and now is seized and possessed thereof; and

4967 Whereas, the said premises are bounded and described as follows, viz:

Beginning at the corner formed by the intersection of the southerly side of East 42nd Street with the westerly side of Lexington Avenue, and running thence southerly along the westerly side of Lexington Avenue one hundred ninety-seven feet and six inches to the northerly side of East 41st Street; thence westerly along the northerly side of East 41st Street one hundred twenty-five feet; thence northerly parallel with Lexington Avenue
4968 one hundred ninety-seven feet and six inches to the southerly side of East 42nd Street, and thence easterly along the southerly side of East 42nd Street one hundred twenty-five feet to the point or place of beginning, be the said several dimensions more or less, said premises being now known as Nos. 122, 124 & 126 East 42nd Street, in the City of New York; and

Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the street adjacent thereto, as an open public street and an interest or estate in the land forming the bed of the said street; and

Whereas, adjacent to the lands and premises

4969

above described, the parties hereinafter named of the last part, are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said party of the first part, or which may hereafter arise to the said party of the first part or its grantees, by reason of the construction, maintenance and operation of the said railroad adjacent to the said premises.

4970

Now, therefore, this instrument, made this first day of June, 1900, between The Manhattan Storage and Warehouse Company, a corporation organized and existing under the laws of the State of New York, party of the first part and the New York Elevated Railroad Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part,

4971

Witnesseth, That for and in consideration of the sum of Six thousand two hundred fifty ($6250.00) dollars, the receipt whereof is hereby acknowledged, the party of the first part hereby releases the parties of the last part and each of them, from all claims, damages, and cause or causes of action, which now exist in favor of the party of the first part, and including all claims, damages, and cause or causes of action for depreciation in the value of the said premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant

4972 to the same, produced by the construction, maintenance or operation of the elevated railroad.

And the party of the first part, hereby grants and conveys to the parties of the last part, their successors and assigns, all the right, title and interest of the said party of the first part in said East 42nd Street and the land forming the bed thereof, and the easements therein, appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same
4973 is now constructed, maintained and operated, except as hereinafter stated; and the party of the first part hereby authorizes and consents to the maintenance of the said structure and the operation of the said railroad through the said street and past the premises hereinbefore described, by the parties of the last part, their successors or assigns forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the party of the first part,
4974 caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated, except that the parties of the last part and their successors or assigns may at any time hereafter use, in the operation of their railroads, electricity or any other motive power, and may also make such repairs to or alterations in the present structure as they may deem expedient; provided, however, that in no case shall said structures, or the operation of trains thereon, be changed, enlarged or added to, so as to materially increase the encroachments upon the easements hereby released and conveyed or the existing bur-

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den upon the abutting property herein above described.

And the said party of the first part covenants with the parties of the last part as follows:

First: That the said covenantor is seized in fee simple absolute of the said property and has good right to convey the same.

Second: That the parties of the last part shall quietly enjoy the said property.

Third: That the said property is free from encumbrances except a mortgage given to secure payment of the sum of $400,000.00.

4976

Fourth: That the said covenantor will execute or procure any further necessary assurance of the title to the said property.

Fifth: That the said covenantor will forever warrant the title to the said property.

In Witness Whereof the party of the first part has caused these presents to be signed by its Vice-President and caused its corporate seal to be hereto affixed this the day and year first above written.

4977

The Manhattan Storage & Warehouse Co., Thomas L. Wells, Vice-Prest.

Sealed and delivered in Presence of William White Whittaker. (Seal) Stamps attached.

Acknowledged on June 7, 1900 by Thomas L. Wells.

4978

Claimants' Exhibit "J-4"—Conveyance and Release, Harriette W. Goelet, et al. to Interborough Rapid Transit Co., N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas Robert Goelet, being already seized of an interest in the premises hereinafter described, acquired the whole title thereto by partition deed dated April 20, 1898, and remained so seized and possessed thereof until April 27, 1899, when he died, leaving his will dated November 8, 1898,

4979 proved before the Court of Probate at Newport, Rhode Island, on June 26, 1899, an exemplified copy whereof and proofs of said probate being duly recorded in the office of the Surrogate of New York Co. on October 18, 1899, by which will testator bequeathed to his wife Harriette W. Goelet an annuity of $200,000, charging the same on all his real estate, and devised his residuary estate, including said premises, to his executors and trustees or to such of them as shall qualify and undertake the execution of said will, the survivors or survivor of them and their successors, in trust for the benefit of his son Robert W. Goelet until he

4980 shall have attained the age of 25 years, when said real estate should be conveyed to said son in fee, but upon his death before attaining such age, having children or issue of deceased children him surviving, or upon his death before such time leaving no children, then the said son's share to vest as in said will provided, subject in any event to said annuity; and

Whereas, said testator appointed his wife Harriette W. Goelet, his son Robert W. Goelet on his attaining the age of 21 years, and George G. DeWitt, executors and trustees, and letters testamen-

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tary were duly issued by said Court of Probate on June 26th, 1899, and ancillary letters testamentary were issued by the Surrogate of New York Co. on November 1, 1899, to the said Harriette W. Goelet, and George G. DeWitt, and the said Robert W. Goelet qualified as executor under letters testamentary granted to him on or about November 24, 1902, by said Court of Probate; which said several letters are unrevoked and in full force; and

Whereas, In an application made to the New York Supreme Court, New York Co., by George G. DeWitt, one of the executors of and trustees under said will, a final order was entered on September 28, 1904, which, among other things, authorized said executors and trustees to make the conveyance hereinafter set forth; and

4982

Whereas, ever since April 27th, 1899, the title to said premises has been and now is vested in the executors of and trustees under said will, as aforesaid; and

Whereas, the said premises are bounded and described as follows, viz:

4983

Beginning at the corner formed by the intersection of the southerly line of 42nd Street with the easterly line of Lexington Avenue; running thence easterly along the southerly line of 42nd Street one hundred and ninety-five feet; thence southerly and parallel with Lexington Avenue ninety-eight feet nine inches to the center line of the block; thence westerly along said center line one hundred and ninety-five feet to the easterly line of Lexington Avenue; thence northerly along Lexington Avenue ninety-eight feet nine inches to the place of beginning, be the said several dimen-

4984 sions more or less said premises being now known as No. 128, 130, 132, 134, 136, 138, 140, 142, 144 and 146 East 42nd Street in the City of New York; and

Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the street adjacent thereto, as an open public street and an interest or estate in the land forming the bed of the said street; and

Whereas, adjacent to the lands and premises
4985 above described, the parties hereinafter named of the last part, and their lessee, the Interborough Rapid Transit Company, are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said parties of the first part, or which may hereafter arise to the said par-
4986 ties of the first part or their grantees, by reason of the construction, maintenance and operation of the said railroad adjacent to the said premises.

Now, Therefore, this instrument made this 7th day of October, 1904, between Harriette W. Goelet, of Newport, Rhode Island, individually and as executrix and trustee, Robert W. Goelet of the same place, as trustee, and George G. DeWitt of New York City, as Executor and trustee, all of and under the last will and testament of Robert Goelet, deceased, parties of the first part, the Interborough Rapid Transit Company, party of the second part, and the New York Elevated Railroad

Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part, 4987

Witnesseth, That for and in consideration of the sum of Seventeen thousand five hundred ($17,500.00) dollars, the receipt whereof is hereby acknowledged, the parties of the first part hereby release the Interborough Rapid Transit Company, party of the second part, and the parties of the last part and each of them, from all claims, damages and cause or causes of action, which now exist in favor of the parties of the first part or 4988
any of them and including all claims, damages and cause or causes of action for depreciation in the value of the said premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railroad.

And, the parties of the first part, hereby grant and convey to the parties of the last part, their successors and assigns, all the right, title and interest of the said parties of the first part, and 4989
which said executors and trustees have power to convey, in said East 42nd Street and the land forming the bed thereof, and the easements therein, appurtenant to said premises which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same is now constructed, maintained and operated, except as hereinafter stated, and the parties of the first part hereby authorize and consent to the maintenance of the said structure and the operation of the said railroad through the

4990 said street and past the premises hereinbefore described, by the parties of the second and last parts, their successors, assigns and lessees forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the parties of the first part, caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated, except that the parties of the second and last parts
4991 and their successors, assigns and lessees may at any time hereafter use, in the operation of their railroads, electricity or any other motive power, and may also make such repairs to or alterations in the present structure as they may deem expedient; provided, however, that in no case shall said structures, or the operation of trains thereon, be changed, enlarged or added to, so as to materially increase the encroachments upon the easements hereby released and conveyed or the existing burden upon the abutting property herein above described.

4992 And the said parties of the first part, as executors and trustees as aforesaid, covenant with the parties of the last part as follows:

First. That the said covenantors have not done nor suffered anything whereby said premises have been encumbered in any way whatever, and have good right to convey the same.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in presence of

Harriette W. Goelet Individually and as executrix and trustee, etc. (Seal).

George G. De Witt as Trustee, etc. (Seal).

Robert Walton Goelet as Executor and trustee &c (Seal).

Acknowledged on October 14th, 1904, by George G. De Witt.

Acknowledged on November 11, 1904, by Robert Walton Goelet.

Acknowledged on November 14th, 1904, by Harriette W. Goelet.

4994

Claimants' Exhibit "J-5"—Conveyance, Dorothy L. Laimbeer, etc. to Manhattan Railway Co. & N. Y. El. R. R. Co.

This Indenture made the seventh day of February, in the year one thousand eight hundred and ninety one, between Dorothy Louisa Laimbeer, executrix of the last will and testament of William Laimbeer, deceased, party of the first part, and the Manhattan Railway Company and The New York Elevated Railroad Company, parties of the second part,

4995

Witnesseth: That, for and in consideration of the sum of Five thousand dollars ($5,000.), the receipt whereof is hereby acknowledged, the party of the first part hereby grants and releases unto the parties of the second part, their, and each of their, successors and assigns forever, all the property of the estate of the said William Laimbeer, deceased, late owner of the land whereof the following is a description:

Beginning at a point in the southerly side of East Forty-second street distant one hundred feet

4996 west from the westerly side of third avenue and running thence southwardly and parallel with Third Avenue ninety-eight feet and nine inches, thence westwardly and parallel with East Forty-second street forty-one feet and eight inches, thence northwardly and parallel with Third avenue ninety-eight feet and nine inches to East Forty-second street, and thence eastwardly along East Forty-second street forty-one feet and eight inches to the point or place of beginning, be the said several dimensions more or less, said premises being now
4997 known as Nos. 156 and 158 East Forty-second street in the city of New York, taken by the parties of the second part, and each and either of them, and by any predecessor of either, by the construction, maintenance and operation of an elevated railroad through East Forty-second Street adjacent to said premises; the intent of these presents being to vest in the parties of the second part, their, and each of their, successors and assigns, the right to maintain the said elevated railroad as *heretofore constructed*, and now maintained, through East Forty-second street adjacent to said
4998 premises, the said elevated structure consisting of iron columns imbedded in the soil, surmounted by a superstructure supporting tracks, and to operate the same in the manner in which the same is now operated;

To Have and to Hold the above granted property unto the said parties of the second part, their, and each of their, successors and assigns forever.

And the said party of the first part covenants with the parties of the second part as follows:

First: That the party of the first part has good right to convey the same.

Second: That the parties of the second part shall quietly enjoy the said property.

Third: That the said property is free from incumbrances.

Fourth: That the party of the first part will execute or procure any further necessary assurance of the title to the said property.

Fifth: That the party of the first part will forever warrant the title to the said property.

In Witness Whereof, the party of the first part has hereunto set her hand and seal the day and year first above written. 5000

Dorothy L. Laimbeer, Executrix (Seal)

Sealed and delivered in presence of George B. Juckett

City and County of New York, ss:

On this 12th day of February, one thousand eight hundred and ninety-one, before me personally appeared Dorothy L. Laimbeer, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and 5001 acknowledged to me that she executed the same for the purposes therein mentioned.

Gorge B. Juckett, Comr. of Deeds, N. Y. City & County.

Claimants' Exhibit "J-6"—Conveyance and Release, Alethea H. Weeks, et al., to N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas, Jacob Weeks being seized in fee simple absolute of certain premises hereinafter described died on or about the 9th day of September, 1881, leaving a last will and testament which

5002 was duly admitted to probate in New York County on September 27th, 1881, by the terms of which said premises were devised to his executors therein named upon trust to collect the rents &c., and pay over the net income thereof to Henry Astor Weeks with remainder to the heirs of the said Henry Astor Weeks and to his wife Alethea H. Weeks, share and share alike, and

Whereas Letters Testamentary on said Will were duly granted to Catharine Weeks, Jacob Weeks Cornwell and George Washington Weeks, Executors on the 27th day of September, 1881, and

5003

Whereas, said Catharine Weeks the above named executrix and trustee, died on or about the 7th day of April, 1882, and said Henry Astor Weeks the above named *cestui que trust* died intestate on or about the 20th day of April, 1891, leaving him surviving his widow Alethea H. Weeks, Mary B. Weeks, a daughter and Bartow S. Weeks, a son, all of full age; and

Whereas, at the date hereof the title to said premises is vested in fee simple absolute in said Alethea H. Weeks, Mary B. Weeks and Bartow S. Weeks as tenants in common, and the said premises are bounded and described as follows, viz.:

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Beginning at the corner formed by the intersection of the southerly side of 42nd Street with the westerly side of Third Avenue and running thence westerly along the southerly side of 42nd Street one hundred feet, thence southerly parallel with Third Avenue or nearly so ninety-eight feet and nine inches, thence easterly parallel with 42nd Street or nearly so one hundred feet to the westerly side of Third Avenue and thence northerly along the westerly side of Third Avenue

ninety-eight feet and nine inches to the point or place of beginning, be the said several dimensions more or less; said premises being now known as Nos. 650, 652, 654, 656 and 658 3rd Ave. and No. 160 E. 42nd St., in the City of New York; and

Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the streets adjacent thereto, as open public streets and an interest or estate in the land forming the beds of the said streets; and

Whereas, adjacent to the lands and premises above described, the parties hereinafter named of the last part are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and 5006

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said parties of the first and second parts, or which may hereafter arise to the said parties of the first part or their grantees, by reason of the construction, maintenance and operation of the said railroad adjacent to the said premises as the same is now constructed, maintained and operated. 5007

Now, therefore, this instrument, made this 2nd day of August 1892, between Alethea H. Weeks, Mary B. Weeks, Bartow S. Weeks and Antoinette M., his wife, parties of the first part and Jacob Weeks Cornwell and George Washington Weeks as the surviving executors of and trustees under the last will and testament of Jacob Weeks, deceased, parties of the second part and The New York Elevated Railroad Company and the Man-

5008 hattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part, Witnesseth:

That for and in consideration of the sum of Five Thousand seven hundred dollars, the receipt whereof is hereby acknowledged, the parties of the first and second parts hereby release the parties of the last part and each of them, from all claims, damages and cause or causes of action, which now exist in favor of the parties of the first and second parts or any of them, and including
5009 all claims, damages, and cause or causes of action for depreciation in the value of the said premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railroad.

[redacted] the parties of the first part, hereby grant and convey to the parties of the last part, their successors and assigns, all the right, title and interest of the said parties of the first part in said
5010 3rd Ave. & 42nd Street and the land forming the beds thereof, and the easements therein, appurtenant to said prmises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said streets as the same is now constructed, maintained and operated; and the parties of the first part hereby authorize and consent to the maintenance of the said structure and the operation of the said railroad through the said streets and past the premises hereinbefore described, by the parties of the last part, their successors or assigns forever, without further compensation or further liability for any

damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the parties of the first part caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated.

And, the said Alethea H. Weeks, Mary B. Weeks and Bartow S. Weeks covenant with the parties of the last part as follows:

First: That the said covenantors are seized in fee of the said property, and have good right to convey the same. 5012

Second: That the parties of the last part shall quietly enjoy the said property.

Third: That the said property is free from encumbrances.

Fourth: That the said covenantors will execute or procure any further necessary assurance of the title to the said property.

Fifth: That the said covenantors will forever warrant the title to the said property.

In Witness Whereof the parties of the first and second parts have hereunto set their hands and seals the day and year first above written. 5013

Sealed and delivered in presence of.

Alethea H. Weeks (Seal)
Mary B. Weeks (Seal)
Bartow S. Weeks (Seal)
Antoinette M. Weeks (Seal)
George Weeks, Ex. & Trustee (Seal)
Jacob W. Cornwell, Exec. & Trs. (Seal)

Acknowledged on August 3, 1892 by Alethea H. Weeks, Mary B. Weeks, Bartow S. Weeks and Antoinette M. Weeks; on September 28, 1892 by Jacob W. Cornwell and George W. Weeks.

5014 *Claimants' Exhibits.*

Claimants' Exhibit "J-7"—Conveyance and Release, Thos. B. Winthrop & Wife to Manhattan Railway Co.

Whereas, Thomas Buchanan Winthrop having formerly held an undivided interest in certain premises, hereinafter described, acquired the whole title thereto in severalty by two several deeds dated respectively July 22, 1874 and January 22, 1883, and ever since he so acquired title has been and now is seized and possessed thereof; and

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Whereas, the said premises are bounded and described as follows, viz.:

Beginning at the corner formed by the intersection of the Northerly side of East 42nd Street with the Easterly side of Depew Place, and running thence Northerly along the Easterly side of Depew Place one hundred feet and five inches to the center of the block; thence Easterly along the center line of the block seventy-five feet; thence Southerly parallel with Depew Place, or nearly so, one hundred feet and five inches to the

5016 Northerly side of 42nd Street, and thence Westerly along the Northerly side of 42nd Street seventy-five feet to the point or place of beginning, be the said several dimensions more or less, said premises being now known as Nos. 119, 121 and 123 East 42nd Street, in the City of New York; and

Whereas, there are and at all times have been attached to the said Winthrop's premises and as part thereof and appurtenant thereto, certain easements of light, air and access in and over said street in front of and adjoining said premises,

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and the said Winthrop acquired with his aforesaid premises the right to have said Forty-second Street in front thereof kept open as a public street and highway; and

Whereas, in or about the year 1877 the New York Elevated Railroad Company commenced the construction of an elevated railroad in said Forty-second Street in front of said Winthrop's premises and completed the same in the month of August, 1878, when it commenced the operation of a steam elevated railroad thereon, and said New York Elevated Railroad Company subsequently and prior to the year 1890 leased the said railroad to the Manhattan Railway Company by which said railroad has ever since been and is now operated; and

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Whereas, the said railway as so constructed and maintained is a permanent structure, and the operation of trains thereon, as the same has been and is now operated, has from the year 1878 to the present time constituted and will hereafter constitute a use inconsistent with and in excess of the ordinary uses for which said Forty-second Street was set apart and reserved in law, and by such inconsistent and excessive street use a portion of the easements of access and of air and light forming part of the land of the said Winthrop has been taken and kept and is now in the possession of the Manhattan Railway Company, and the maintenance of said structure has obstructed and will hereafter continuously obstruct the access and lessen the light in said Winthrop's premises, and the running of trains thereon, with the noise and the escape of steam, cinders, dust, noxious gases and odors from the

5019

5020 locomotives have obstructed, and will hereafter obstruct, lessen and interfere with the air and light which would otherwise enter said premises; and

Whereas, heretofore the said party of the first part instituted his certain action against the said Manhattan Railway Company seeking to perpetually enjoin the said Manhattan Railway Company from maintaining, continuing or operating said railway structure in front of his said premises as aforesaid; and

5021 Whereas, such proceedings were had in said action that on the 23rd day of October, 1896, final judgment was therein entered, adjudging, among other things, that the value of the said Winthrop's property and easements above described as taken, withheld, appropriated and used by said Manhattan Railway Company was Thirty-one Thousand Dollars, and that the value of said Winthrop's premises was lessened Thirty-one Thousand Dollars by the aforesaid acts of the Manhattan Railway Company and that such damages were continuous; and

5022 Whereas, said judgment further provided that the said Manhattan Railway Company be and they were perpetually enjoined and restrained from maintaining or in any way using the elevated railroad structure in front of said Winthrop's property hereinabove described, except to remove the same, and from operating trains of cars thereon on and after ninety days from the entry of said judgment; and which judgment further decreed that in case the Manhattan Railway Company should, within ninety days after the service of a copy of such judgment, deliver to the said Winthrop a written offer to pay him said sum of

Thirty-one thousand dollars, then, upon said Winthrop's tender to the said Manhattan Railway Company of a duly executed conveyance or grant of so much of the property of said Winthrop in Forty-second Street in front of Nos. 119, 121 and 123 East 42nd Street, and the easements appurtenant thereto, as had been taken and appropriated by the Manhattan Railway Company for the purposes of its said structure or railroad, with a release of the lien of all mortgages upon said property and all encumbrances thereon, except a certain lease of said premises dated June 2nd, 1875, and said Manhattan Railway Company pay said sum of Thirty-one thousand dollars to said Winthrop therefor, with interest from the date of the trial on the delivery thereof, then the said injunction should not be operative so far as it affects the maintenance and operation of said structure and railroad at said locality, until ten days after the said Winthrop may thereafter deliver or tender for delivery said conveyance or grant, and if such payment were duly made, the said injunction should thereafter remain wholly inoperative.

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Now, therefore, this instrument made this first day of February, one thousand nine hundred, between Thomas Buchanan Winthrop, of the City of New York, and Sarah Helen, his wife, parties of the first part, and the Manhattan Railway Company, a corporation duly organized under the Laws of the State of New York, party of the second part, Witnesseth:

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That for and in consideration of the sum of Thirty-one Thousand Dollars, with interest thereon from October 15, 1896, the receipt whereof is hereby acknowledged, the parties of the first part here-

by grant and convey to the party of the second part, its successors and assigns, so much of the property of the said Winthrop in Forty-second Street, in front of Nos. 119, 121 and 123 East Forty-second Street, and the easements appurtenant thereto, as on said 23rd day of October, 1896, had been taken and appropriated by the Manhattan Railway Company for the purpose of its said structure or railroad.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day
5027 and year first above written.

Thomas Buchanan Winthrop (Seal)
Sarah Helen Winthrop (Seal).

Sealed and delivered in
presence of

Winthrop McKim

$31 revenue stamps cancelled.

Acknowledged on February 6, 1900 by Thomas Buchanan Winthrop.

Acknowledged on February 6, 1900 by Sarah
5028 Helen Winthrop.

Certificate of City Clerk of City of New York attached.

Claimants' Exhibit "J-8"—Conveyance, J. Frederic Kernochan, etc. to Manhattan Railway Co.

Whereas, by a partition deed dated January 25, 1865, the title to certain premises hereinafter described, became vested in Henry R. Winthrop, as trustee of the share of Harriet R. Winthrop (now Harriet R. McKim) and her issue, etc., under the

Will of Almy T. Hicks, deceased, with power of sale in said trustee with the approval of the said Harriet R. McKim; and 5029

Whereas, by an order of the Supreme Court, New York County, dated January 15, 1897, J. Frederic Kernochan was duly appointed as substituted Trustee in place and stead of the said Henry R. Winthrop, and has been ever since his appointment and now is seized and possessed of the said premises as trustee as aforesaid; and

Whereas, the said premises are bounded and described as follows, viz.: 5030

Beginning at a point on the northerly side of East 42nd Street, one hundred fifty feet westerly from the corner formed by the intersection of the northerly side of East 42nd Street with the westerly side of Lexington Avenue, and running thence northerly and parallel with Lexington Avenue one hundred feet and five inches to the center of the block; thence westerly parallel with 42nd Street fifty feet; thence southerly parallel with Lexington Avenue one hundred feet and five inches to the northerly side of East 42nd Street, and thence easterly along the northerly side of East 42nd Street fifty feet to the point or place of beginning, be the said several dimensions more or less; said premises being now known as Nos. 125 and 127 East 42nd Street, in the City of New York; and 5031

Whereas, there are and at all times have been attached to the said trustee's premises and as part thereof and appurtenant thereto, certain easements of light, air and access in and over said street in front of and adjoining said premises, and the said trustee acquired with his aforesaid prem-

5032 ises the right to have said Forty-second Street in front thereof kept open as a public street and highway; and

Whereas, in or about the year 1877, the New York Elevated Railroad Company commenced the construction of an elevated railroad in said Forty-second Street in front of said trustee's premises and completed the same in the month of August, 1878, when it commenced the operation of a steam elevated railroad thereon, and said New York Elevated Railroad Company subsequently and prior
5033 to the year 1890 leased the said railroad to the Manhattan Railway Company, by which said railroad has ever since been and is now operated; and

Whereas, the said Railway as so constructed and maintained, is a permanent structure, and the operation of trains thereon, as the same has been and is now operated, has from the year 1878 to the present time constituted and will hereafter constitute a use inconsistent with and in excess of the ordinary uses for which said Forty-second Street was set apart and reserved in law, and by such
5034 inconsistent and excessive street use a portion of the easements of access and of air and light forming part of the land of the said trustee has been taken and kept and is now in the possession of the Manhattan Railway Company, and the maintenance of said structure has obstructed and will hereafter continuously obstruct the access and lessen the light in said trustee's premises, and the running of trains thereon, with the noise and the escape of steam, cinders, dust, noxious gases and odors from the locomotives have obstructed, and will hereafter obstruct, lessen and interfere with

the air and light which would otherwise enter said premises; and

Whereas, heretofore the said Henry R. Winthrop, as trustee under the Will of Almy T. Hicks, deceased, instituted his certain action against the said Manhattan Railway Company seeking to perpetually enjoin the said Manhattan Railway Company from maintaining, continuing or operating said railway structure in front of his said premises as aforesaid; and

Whereas, such proceedings were had in said action that on the 23d day of October, 1896, final judgment was therein entered, adjudging, among other things, that the value of the said trustee's property and easements above described as taken, withheld, appropriated and used by said Manhattan Railway Company was Twenty thousand, six hundred and sixty-six and two-thirds Dollars, and that the value of said trustee's premises was lessened Twenty thousand, six hundred and sixty-six and two-thirds Dollars by the aforesaid acts of the Manhattan Railway Company, and that such damages were continuous; and

Whereas, said judgment further provided that the said Manhattan Railway Company be and they were perpetually enjoined and restrained from maintaining or in any way using the elevated railroad structure in front of said trustee's property hereinabove described, except to remove the same, and from operating trains of cars thereon on and after ninety days from the entry of said judgment; and which judgment further decreed that in case the Manhattan Railway Company should, within ninety days after the service of a copy of such judgment, deliver to the said trustee a written offer to pay his said sum of Twenty thousand, six

5038 hundred and sixty-six and two-thirds Dollars, then upon said trustee's tender to the said Manhattan Railway Company of a duly executed conveyance or grant of so much of the property of said trustee in Forty-second Street in front of Numbers 125 and 127 East Forty-second Street, and the easements appurtenant thereto, as had been taken and appropriated by the Manhattan Railway Company for the purposes of its said structure or railroad, with the release of the lien of all mortgages upon said property and all encumbrances thereon, except a
5039 certain lease of said premises, dated June 2, 1875, and said Manhattan Railway Company pay said sum of Twenty thousand, six hundred and sixty-six and two-thirds Dollars to said trustee therefor, with interest from the date of the trial on the delivery thereof, then the said injunction should not be operative so far as it affects the maintenance and operation of said structure and railroad at said locality, until ten days after the said trustee may thereafter deliver or tender for delivery said conveyance or grant, and if such payment were duly made, the said injunction should thereafter remain wholly inoperative.

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Now, Therefore, this instrument made this first day of February One thousand, nine hundred, between J. Frederic Kernochan, of the City of New York, as substituted trustee in place and stead of Henry R. Winthrop under the Will of Almy T. Hicks, deceased, party of the first part, and the Manhattan Railway Company, a corporation duly organized under the laws of the State of New York, party of the second part, Witnesseth:

That for and in consideration of the sum of Twenty thousand, six hundred and sixty-six and

two-thirds Dollars, with interest thereon from October 15, 1896, the receipt whereof is hereby acknowledged, the party of the first part hereby grants and conveys to the party of the second part, its successors and assigns, so much of the property of the said trustee in Forty-second Street in front of Numbers 125 and 127 East Forty-second Street, and the easements appurtenant thereto as on said 23d day of October, 1896, had been taken and appropriated by the Manhattan Railway Company for the purpose of its said structure or railroad. 5042

In Witness Whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

J. Frederic Kernochan, Trustee &c. (L. S.)

Sealed and delivered in the presence of:

Winthrop McKim

State of New York, County of New York, ss.:

On this 6th day of February, one thousand, nine hundred, before me personally appeared J. Frederic Kernochan, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the purposes therein mentioned. 5043

Winthrop McKim, Commissioner of Deeds, City of New York.

Certificate of City Clerk, Feb. 9, 1900, certifying that Winthrop McKim at time of taking above acknowledgment, was a Commissioner of Deeds &c.

5044

Claimants' Exhibit "J-9"—Conveyance, Harriet R. McKim to Manhattan Railway Co.

Whereas, Harriet R. McKim, having previously held an undivided interest in certain premises hereinafter described, acquired the whole title thereto by deed dated January 22, 1883, and ever since said date has been and now is seized and possessed thereof; and

Whereas, the said premises are bounded and described as follows, viz:

5045

Beginning at a point on the northerly side of East 42nd Street, one hundred and twenty-five feet westerly from the corner formed by the intersection of the northerly side of East 42nd Street with the westerly side of Lexington Avenue, and running thence northerly parallel with Lexington Avenue one hundred feet and five inches to the center of the block; thence westerly parallel with East 42nd Street twenty-five feet; thence southerly parallel with Lexington Avenue one hundred feet and five inches to the northerly side of 42nd Street; thence easterly along the northerly side of 42nd Street twenty-five feet to the point or place of beginning, be the said several dimensions more or less; said premises being now known as No. 129 East 42nd Street, in the City of New York; and

5046

Whereas, there are and at all times have been atached to the said Harriet R. McKim's premises and as part thereof and appurtenant thereto, certain easements of light, air and access in and over said street in front of and adjoining said premises and the said Harriet R. McKim acquired with her aforesaid premises the right to have said Forty-second Street in front thereof kept open as a public street and highway; and

5047

Whereas, in or about the year 1877 the New York Elevated Railroad Company commenced the construction of an elevated railroad in said Forty-second Street in front of said Harriet R. McKim's premises and completed the same in the month of August, 1878, when it commenced the operation of a steam elevated railroad thereon, and said New York Elevated Railroad Company subsequently and prior to the year 1890 leased the said railroad to the Manhattan Railway Company, by which said railroad has ever since been and is now operated; and

5048

Whereas, the said Railway as so constructed and maintained, is a permanent structure, and the operation of trains thereon, as the same has been and is now operated, has from the year 1878 to the present time constituted and will hereafter constitute a use inconsistent with and in excess of the ordinary uses for which said Forty-second Street was set apart and reserved in law, and by such inconsistent and excessive street use a portion of the easements of access and of air and light forming part of the land of the said Harriet R. McKim has been taken and kept and is now in the posession

5049

of the Manhattan Railway Company, and the maintenance of said structure has obstructed and will hereafter continuously obstruct the access and lessen the light in said Harriet R. McKim's premises, and the running of trains thereon, with the noise and the escape of steam, cinders, dust, noxious gases and odors from the locomotives have obstructed, and will hereafter obstruct, lessen and interfere with the air and light which would otherwise enter said premises; and

Whereas, heretofore the said party of the first

5050 part instituted her certain action against the said Manhattan Railway Company seeking to perpetually enjoin the said Manhattan Railway Company from maintaining, continuing or operating said railway structure in front of her said premises as aforesaid; and

Whereas, such proceedings were had in said action that on the 23d day of October, 1896, final judgment was therein entered, adjudging, among other things, that the value of the said Harriet R. McKim's property and easements above described
5051 as taken, withheld, appropriated and used by said Manhattan Railway Company was Ten thousand, three hundred and thirty-three and one-third Dollars, and that the value of said Harriet R. McKim's premises was lessened Ten thousand, three hundred and thirty-three and one-third Dollars by the aforesaid acts of the Manhattan Railway Company and that such damages were continuous; and

Whereas, said judgment further provided that the said Manhattan Railway Company be and they were perpetually enjoined and restrained from maintaining or in any way using the elevated rail-
5052 road structure in front of said Harriet R. McKim's property hereinabove described, except to remove the same, and from operating trains of cars thereon on and after ninety days from the entry of said judgment; and which judgment further decreed that in case the Manhattan Railway Company should, within ninety days after the service of a copy of such judgment, deliver to the said Harriet R. McKim a written offer to pay her said sum of Ten thousand, three hundred and thirty-three and one-third Dollars, then upon said Harriet R. McKim's tender to the said Manhattan Railway Com-

pany of a duly executed conveyance or grant of so much of the property of said Harriet R. McKim in Forty-second Street in front of Number 129 East Forty-second Street, and the easements appurtenant thereto, as had been taken and appropriated by the Manhattan Railway Company for the purposes of its said structure or railroad, with the release of the lien of all mortgages upon said property and all encumbrances thereon, except a certain lease of said premises, dated June 2, 1875, and said Manhattan Railway Company pay said sum of Ten thousand, three hundred and thirty-three 5054
and one-third Dollars to said Harriet R. McKim therefor, with interest from the date of the trial on the delivery thereof, then the said injunction should not be operative so far as it affects the maintenance and operation of said structure and railroad at said locality, until ten days after the said Harriet R. McKim may thereafter deliver or tender for delivery said conveyance or grant, and if such payment were duly made, the said injunction should thereafter remain wholly inoperative,

Now Therefore, this instrument made this fifth day of February, One thousand nine hundred, be- 5055
tween Harriet R. McKim, of the City of New York, party of the first part, and the Manhattan Railway Company, a corporation duly organized under the laws of the State of New York, party of the second part, Witnesseth:

That for and in consideration of the sum of Ten thousand three hundred and thirty-three and one-third Dollars, with interest thereon from October 15, 1896, the receipt whereof is hereby acknowledged, the party of the first part hereby grants and conveys to the party of the second part, its suc-

cessors and assigns, so much of the property of the said Harriet R. McKim in Forty-second Street in front of Number 129 East Forty-second Street, and the easements appurtenant thereto as on said 23d day of October, 1896, had been taken and appropriated by the Manhattan Railway Company for the purpose of its said structure or railroad.

In Witness Whereof, the party of the first part has hereunto set her hand and seal the day and year first above written.

5057 Harriet R. McKim (LS)

Sealed and delivered
in the presence of

Winthrop McKim.

(Stamps)

State of New York, County of New York, ss:

On this 6th day of February, one thousand nine hundred, before me personally appeared Harriet R. McKim, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged
5058 to me that she executed the same for the purposes therein mentioned.

Winthrop McKim, Commissioner of Deeds, City of New York.

(Certificate of proof of acknowledgment of annexed instrument attached.)

Claimants' Exhibit "J-10"—Conveyance and Release, Jas. W. Pinchot to N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas, under date of June 2, 1875, Charlotte B. Hicks, T. Buchanan Winthrop and Sallie H.

5059

Winthrop, his wife, and Henry R. Winthrop, as Trustee of T. Buchanan Winthrop and Harriet R. McKim, duly made and executed a lease of certain premises hereinafter described, to Theodore Weston and James W. Pinchot for a term of fifty-seven years from May 1st, 1875, and the said lease contained a covenant that the lessees, at any time before the end of the term or within twenty days thereafter, may remove the buildings thereon erected, unless the lessors should elect to purchase the same; and

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Whereas, under date of May 26, 1879, the said Theodore Weston duly assigned all his interest in the said leasehold to the said James W. Pinchot, who, ever since he so acquired title has been and now is in possession as lessee of the said premises and as owner of the buildings thereon erected; and

Whereas, the said premises are bounded and described as follows, viz.:—Beginning at the corner formed by the intersection of the northerly side of East 42nd Street with the easterly side of Depew Place, and running thence northerly along the easterly side of Depew Place two hundred feet and ten inches to the southerly side of 43rd Street;

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thence easterly along the southerly side of 43rd Street one hundred and fifty feet; thence southerly parallel with Depew Place two hundred feet and ten inches to the northerly side of East 42nd Street, and thence westerly along the northerly side of East 42nd Street one hundred and fifty feet to the point or place of beginning, be the said several dimensions more or less, said premises being now known as Nos. 119 to 129 East 42nd Street, in the City of New York; and

Whereas, appurtenant to said premises there are

5062 claimed to be certain rights or easements to the enjoyment of the street adjacent thereto, as an open public street and an interest or estate in the land forming the bed of the said street; and

Whereas, adjacent to the lands and premises above described, the parties hereinafter named of the last part are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend,
5063 for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said party of the first part or which may hereafter arise to the said party of the first part or his grantees, by reason of the construction, maintenance and operation of the said railroad adjacent to the said premises during the term of said lease and of any renewals thereof.

Now Therefore, this instrument made this 6th day of April, 1901 between James W. Pinchot, of the City of New York, party of the first part and
5064 the New York Elevated Railroad Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part,

Witnesseth, That for and in consideration of the sum of Thirty-six thousand ($36,000.00) dollars, the receipt whereof is hereby acknowledged, the party of the first part hereby releases the parties of the last part and each of them, from all claims, damages, and cause or causes of action, which now exist in favor of the party of the first part and including all claims, damages, and cause or causes of action for depreciation in the value of the said

premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railroad. 5065

And, the party of the first part, hereby grants and conveys to the parties of the last part, their successors and assigns, all the right, title and interest of the said party of the first part in said East 42nd Street, and the land forming the bed thereof, and the easements therein, appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same is now constructed, maintained and operated, except as hereinafter stated; and the party of the first part hereby authorizes and consents to the maintenance of the said structure and the operation of the said railroad through the said street and past the premises hereinbefore described, by the parties of the last part, their successors or assigns forever, without further compensation or further liability for any damages that may hereafter during the term of said lease and of any renewal thereof be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the party of the first part, caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated, except that the parties of the last part and their successors or assigns may at any time hereafter use, in the operation of their railroads, electricity or any other motive power, and may also make such repairs to or alterations in the present structure as they may deem expedient; 5066 5067

5068 provided, however, that in no case shall said structures, or the operation of trains thereon, be changed, enlarged or added to, so as to materially increase the encroachments upon the easements hereby released and conveyed or the existing burden upon the abutting property herein above described.

And, the said party of the first part covenants with the parties of the last part as follows:

First: That the said covenantor is in possession, as lessee, of and as owner of the buildings
5069 erected upon the demised lands and is entitled to the possession of the said property hereby released and has good right to convey the same.

Second: That the parties of the last part shall quietly enjoy the said property hereby released.

Third: That the said property hereby released is free from encumbrances.

Fourth: That the said covenantor will execute or procure any further necessary assurance of the title to the said property hereby released.

Fifth: That the said covenantor will during the
5070 term of said lease and of any renewals thereof warrant the title to the said property hereby released.

In Witness Whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

James W. Pinchot (LS)

Sealed and delivered in presence of

Leon Malraison, Notary Public, New York County, N. Y.

5071

State of New York, County of New York, ss.:

On this ninth day of April, one thousand nine hundred and one (1901) before me personally appeared James W. Pinchot, to me known, and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the purposes therein mentioned.

Leon Malraison, Notary Public, New York County, N. Y. (Seal)

5072

Claimants' Exhibit "J-11"—Conveyance and Release, Cooper Union for Advancement of Science and Art, et al. to N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas, Edward Cooper and Abram S. Hewitt, as Trustees, acquired title in fee simple to the premises hereinafter described by deed dated December 1st, 1880, and remained so seized and possessed of the same until on or about the 1st day of March, 1902, when by instrument bearing that date they conveyed an undivided one half interest in said premises to Edward Cooper, and a like interest to Sarah A. Hewitt, in fee; and

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Whereas, by instrument dated March 3rd, 1902, the said Edward Cooper individually and as Trustee, Abram S. Hewitt, as Trustee, and Sarah A. Hewitt, conveyed said premises to Cooper Union for the advancement of Science and Art, a domestic corporation, which since said date has been and now is seized in fee of said premises; and

Whereas, the said premises are bounded and described as follows, viz:

5074

Beginning at the corner formed by the intersection of the Northerly side of Forty second Street with the Easterly side of Lexington Avenue, and running thence Northerly along the Easterly side of Lexington Avenue Forty feet; thence Easterly parallel or nearly so with Forty second Street Eighty seven feet and two inches; thence Northerly parallel or nearly so with Lexington Avenue Sixty feet and five inches; thence again Easterly to a point; thence Southwesterly to a point on the Northerly side of Forty second Street One hundred

5075

sixty seven feet and two inches Easterly from the said Northeasterly corner of Forty second Street and Lexington Avenue, and thence Westerly along said Northerly side of Forty second Street One hundred and sixty seven feet and two inches to the point or place of beginning, be the said several dimensions more or less said premises being now known as Nos. 135 to 143 East 42nd Street in the City of New York; and

Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the street adjacent thereto as an open

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public street and an interest or estate in the land forming the bed of the said street; and

Whereas, adjacent to the lands and premises above described the parties hereinafter named of the last part are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which

may have arisen to the said parties of the first and second parts, or which may hereafter arise to the said party of the first part or its grantees, by reason of the construction, maintenance and operation of the said railroad, adjacent to the said premises. 5077

Now, therefore, this instrument, made this seventh day of February 1903, between Cooper Union for the Advancement of Science and Art, a corporation organized and existing under the Laws of the State of New York, party of the first part, and Edward Cooper individually and as Trustee and Sarah A. Hewitt parties of the second part and the New York Elevated Railroad Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part, Witnesseth, That for and in consideration of the sum of Twenty five thousand and fifty ($25,050) dollars, the receipt whereof is hereby acknowledged, the parties of the first and second parts hereby release the parties of the last part and each of them, from all claims, damages, and cause or causes of action, which now exist in favor of the parties of the first and second parts or any of them and including all claims, damages, and cause or causes of action for depreciation in the value of the said premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railroad. 5078 5079

And, the party of the first part, hereby grants and conveys to the parties of the last part, their successors and assigns, all the right, title and in-

5080 terest of the said party of the first part in said East 42nd Street and the land forming the bed thereof, and the easements therein, appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same is now constructed, maintained and operated, except as hereinafter stated; and the party of the first part hereby authorizes and consents to the maintenance of the said structure and the operation of the said railroad through the said street and past the prem-
5081 ises hereinbefore described, by the parties of the last part, their successors or assigns forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the party of the first part, caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated, except that the parties of the last part and their successors or assigns may, upon the condition next hereinafter stated, at any time hereafter use, in
5082 the operation of their railroads, electricity or any other motive power, and may also make such repairs to or alterations in the present structure as they may deem expedient; provided, however, that in no case shall said structures, or the operation of trains thereon, be changed, enlarged or added to, so as to materially increase the encroachments upon the easements hereby released and conveyed or the existing burden upon the abutting property herein above described.

And the said party of the first part covenants with the parties of the last part as follows:

5083

First: That the said covenantor is seized in fee simple of the said property, and has good right to convey the same.

Second: That the parties of the last part shall quietly enjoy the said property.

Third: That the said property is free from encumbrances.

Fourth: That the said covenantor will execute or procure any further necessary assurance of the title to the said property.

Fifth: That the said covenantor will forever warrant the title to the said property. 5084

In Witness Whereof, the party of the first part has caused these presents to be subscribed by its President and caused its corporate seal to be hereto affixed, and the parties of the second part have hereunto set their hands and seals the day and year first above written.

Edward Cooper (L.S.) individually and as Trustee.

Cooper Union for the Advance of Science and Art (L.S.) by Edward Cooper, President. 5085

Attest L. C. L. Jordon Asst. Secy. (Corporate Seal)

Sarah A. Hewitt (L.S.)

Sealed and delivered in presence of

Philip K. Walcott as to Edward Cooper individually and as trustee and as President.

Edward E. Haskell as to L. C. L. Jordon, F. M. Sanders as to Sarah A. Hewitt.

State of New York, County of New York, ss.:

On this seventh day of February, one thousand nine hundred and three (1903) before me per-

5086 sonally appeared Edward Cooper, to me known, and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the purposes therein mentioned, both individually and as trustee as aforesaid.

Philip K. Walcott, Commissioner of Deeds, New York City.

State of New York, County of New York, ss.:

5087 On this seventh day of February, one thousand nine hundred and three (1903) before me personally appeared Sarah A. Hewitt, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same for the purposes therein mentioned.

Fred. M. Sanders, Notary Public No. 287, New York Co.

State of New York, County of New York, ss.:

5088 On this seventh day of February, in the year one thousand nine hundred and three (1903) before me personally came Edward Cooper to me known, who being by me duly sworn did depose and say that he resided in the City of New York; that he is the President of the Cooper Union for the Advancement of Science and Art, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by authority of the Board of Trustees of said corporation, and that he signed his name thereto by like authority.

Philip K. Walcott, Commissioner of Deeds, New York City.

5089

State of New York, County of New York, ss.:

On this seventh day of February, in the year one thousand nine hundred and three (1903) before me personally came L. C. L. Jordan, to me known, who being by me duly sworn did depose and say that he resided in the City of Mount Vernon, Westchester County, New York; that he is the assistant secretary of the Cooper Union for the Advancement of Science and Art, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; 5090
that it was so affixed by authority of the Board of Trustees of the said corporation, and that he signed his name thereto by like authority; and the said L. C. L. Jordan further said that he was acquainted with Edward Cooper, and knew him to be the president of said corporation; that the signature of the said Edward Cooper subscribed to said conveyance was in the genuine handwriting of the said Edward Cooper, and was thereto subscribed by the like authority of the said Board of Trustees and in the presence of him, the said L. C. L. Jordan.

Edward E. Haskell, Notary Public 49, New York 5091
County. (LS)

Claimants' Exhibit "J-12"—Conveyance and Release, Mary R. Goelet, et al., to Interborough Rapid Transit Co., N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas Robert Goelet and Ogden Goelet, being already respectively seized of an undivided interest in the premises hereinafter described, acquired the whole title thereto in fee simple, as tenants in common, by partition deed dated March 12, 1881

5092 *Claimants' Exhibits.*

and so remained the owners thereof until August 27, 1897, when the said Ogden Goelet died, leaving his will dated December 2, 1895, proved in New York Co. October 7, 1897, whereby he devised his residuary estate, including his interest in said premises, to his executors and trustees, or to such of them as qualify, and their survivors and survivor, or their successors, in trust for the benefit of his son Robert Goelet and his daughter Mary W. Goelet, as in said will provided; said testator authorizing and empowering his executors and
5093 trustees (among other things) to make or cause to be made a just and actual partition and division of said real estate or any part thereof held in common or jointly by testator with any other person or to join with such other tenants in common in making such partition, &c., and

Whereas, said testator appointed his wife Mary R. Goelet, his brother Robert Goelet, George G. DeWitt, and his son Robert Goelet on his attaining the age of twenty-one years, as executors of and trustees under said will; and letters testamentary were issued on October 9, 1897 to the said Mary R.
5094 Goelet and George G. DeWitt, and on September 28, 1901, to testator's said son Robert Goelet, (he having theretofore attained the age of 21 years) who respectively qualified as such executors and trustees; and

Whereas by partition deed dated April 20, 1898, the said Mary R. Goelet and George G. DeWitt, then the sole qualified and acting executors of and trustees under said will, acquired the whole title to said premises, subject to the trusts and powers and to and for the uses and purposes declared in said will; and

5095

Whereas, in an application to the N. Y. Supreme Court, N. Y. County, by George G. DeWitt, one of said executors and trustees &c. a final order was duly entered on July 26, 1904, authorizing (among other things) the executors of and trustees under said will to make the conveyance and release hereinafter following; and

Whereas, the said premises are bounded and described as follows, viz:—

Beginning at a point on the northerly side of 42nd St., distant one hundred sixty-seven feet and two inches easterly from the corner formed by the intersection of the northerly line of 42nd Street with the easterly line of Lexington Avenue, and running thence northerly eighty-two feet and eight and one-half inches; thence easterly and parallel or nearly so with 42nd Street thirty-three feet and one-fourth of an inch; thence southerly seven feet and one-fourth of an inch to a point distant seventy-eight feet and one and one-half inches from the northerly line of 42nd Street; thence southerly and parallel with Third Avenue seventy-eight feet and one and one-half of an inch to the northerly line of 42nd Street and thence westerly along 42nd Street fifty-two feet and ten inches to the point or place of beginning, be the said several dimensions more or less, said premises being now known as Nos. 145 and 147 East 42nd Street, in the City of New York; and

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Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the street adjacent thereto, as an open public street and an interest or estate in the land forming the bed of the said street; and

Whereas, adjacent to the lands and premises

5098 above described, the parties hereinafter named of the last part, and their lessee, the Interborough Rapid Transit Company, are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said parties of the first
5099 part, or which may hereafter arise to the said parties of the first part or their grantees, by reason of the construction, maintenance and operation of the said railroad adjacent to the said premises

Now, Therefore, this instrument made this 6th day of October, 1904, between Mary R. Goelet and Robert Goelet, both of Newport, Rhode Island, and George G. DeWitt, of New York City, as Executors of and trustees under the last will and testament of Ogden Goelet, deceased, parties of the first part, the Interborough Rapid Transit Company, party of the second part, and the New York Elevated
5100 Railroad Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part,

Witnesseth, That for and in consideration of the sum of Four thousand five hundred ($4500.00) dollars, the receipt whereof is hereby acknowledged, the parties of the first part hereby release the Interborough Rapid Transit Company, party of the second part, and the parties of the last part and each of them, from all claims, damages and cause or causes of action, which now exist in favor of

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the parties of the first part or any of them and including all claims, damages and cause or causes of action for depreciation in the value of the said premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railroad.

And the parties of the first part, hereby grant and convey to the parties of the last part, their successors and assigns, all the right, title and interest of the said parties of the first part and which they have power to convey, in said East 42nd Street, and the land forming the bed thereof, and the easements therein, appurtenant to said premises which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same is now constructed, maintained and operated, except as hereinafter stated, and the parties of the first part hereby authorize and consent to the maintenance of the said structure and the operation of the said railroad through the said street and past the premises hereinbefore described, by the parties of the second and last parts, their successors, assigns, and lessees forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the parties of the first part, caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated, except that the parties of the second and last parts and their successors, assigns, and lessees may at any time hereafter use, in the

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5104 operation of their railroads, electricity or any other motive power, and may also make such repairs to or alterations in the present structure as they may deem expedient; provided, however, that in no case shall said structures, or the operation of trains thereon, be changed, enlarged or added to, so as to materially increase the encroachments upon the easements hereby released and conveyed or the existing burden upon the abutting property hereinabove described.

And the said parties of the first part, as execu-
5105 tors and trustees as aforesaid covenant with the parties of the last part as follows:

First: That the said covenantors have not done nor suffered anything whereby said premises have been encumbered in any way whatever and have good right to convey the same.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

Mary R. Goelet as Executrix and Trustee &c. (Seal)

5106 George G. DeWitt as Executor and Trustee &c. (Seal)

Robert Goelet as Executor and Trustee &c. (Seal)

Sealed and delivered in the presence of F. Firth, Jr.

As to Mary R. Goelet and Robert Goelet.

Mortimer Bishop as to Geo. G. DeWitt.

Acknowledged on October 14, 1904 by George DeWitt; on October 25, 1904 by Robert Goelet and on January 5, 1905 by Mary R. Goelet.

5107

Claimants' Exhibit "J-13"—Conveyance and Release, Jas. Hernon to N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas, James Hernon acquired title to certain premises, hereinafter described, by deed dated March 26th, 1884, and ever since said date has been and now is seized and possessed of the same, which said premises are now known as No. 149 East Forty-second Street, in the City of New York, and are bounded and described as follows: Beginning at a point in the northerly side of East Forty-second Street, about one hundred and seventy-five feet west from the westerly side of Third Avenue, and running thence northwardly, and parallel or nearly so with Third Avenue sixty-two feet and eight inches; thence northwestwardly twenty-eight feet eight and one-half inches; thence southwardly, and parallel or nearly so with Third Avenue, seventy-eight feet one and one-half inches to East Forty-second Street; and thence eastwardly, along East Forty-second Street, twenty-five feet to the point or place of beginning, be the said several dimensions more or less; appurtenant to which said premises there are claimed to be certain rights or easements to the enjoyment of the street in front of said premises, as an open public street, and an interest or estate in the land forming the bed of the said street; and

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Whereas, the New York Elevated Railroad Company, a corporation duly organized under the laws of the State of New York, heretofore, and in or about the year 1879, began the construction of an elevated railway through East 42nd Street, in front of the lands and premises above described, the construction of which said elevated railway was

5110 thereafter, and in 1880, completed, and trains of cars, drawn by steam locomotives, were from such time operated thereon, and have continued to be so operated until the present time; and

Whereas, in or about the month of May, 1879, and on or about the first day of August, 1884, the Manhattan Railway Company, a corporation duly organized under the laws of the State of New York, leased from the said New York Elevated Railroad Company said elevated railway, and thereafter maintained and operated the same with steam lo-

5111 comotives, with the exception of the months of June and July, 1884, at which times the New York Elevated Railroad Company operated the same, and the Manhattan Railway Company or its successors intend to operate and maintain the same forever; and

Whereas, under and pursuant to the provisions of Chapter 254 of the Laws of 1867, and of Chapter 503 of the Laws of 1879, the New York Elevated Railroad Company, on the 3d day of February, 1890, became merged in the Manhattan Railway

5112 Company, and the estate, property, rights, privileges and franchises of the said New York Elevated Railroad Company have vested in and are now held and enjoyed by said Manhattan Railway Company; and

Whereas, the parties to this agreement desire and intend, for the consideration hereinafter expressed, to settle, adjust and compromise all the claims and causes of action against said companies, or either of them, which may have arisen to the party of the first part, or which may hereafter arise to the said party of the first part or his grantees, by reason of the construction, mainte-

nance and operation of the said railway in front of the said premises; and as now constructed, maintained and operated; and

Whereas the party of the first part, for the consideration hereinafter expressed intends to release the parties of the last part from all causes of action, claims and liability for damages, injuries and annoyances which may heretofore have been inflicted, or which may hereafter be inflicted, upon the premises hereinbefore described, or the owner thereof, or the occupant thereof, by the erection, maintenance and operation of the said railway in the street upon which said premises abut, or by reason of the destruction of or the interference with the easements and rights appurtenant to said premises, occasioned by such construction, maintenance and operation of the said elevated railway, as now constructed, maintained and operated; and 5114

Whereas the party of the first part intends to grant and convey to the parties of the last part all such easement, interest, right or title in the said street, and the land forming the bed thereof, as is or may be necessary for the erection, maintenance and operation of the said elevated railway through the said street, and past the said premises, as the same is now constructed and operated, and intends to grant authority and permission to the parties of the last part, their successors and assigns, to maintain and operate forever said elevated railway, including the structure and trains as at present maintained and operated, and without payment of further compensation or damages. 5115

Now, Therefore, this agreement made this 8th day of May, 1890, between James Hernon, party of the first part, and The New York Elevated Rail-

5116 road Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part, Witnesseth:

That for and in consideration of the sum of twenty-one hundred and seventy-four and 58/100 dollars, paid by the parties of the last part to the party of the first part, the receipt whereof is hereby acknowledged, the party of the first part hereby releases the parties of the last part and each of them, from all claims, damages and cause or
5117 causes of action, which now exist in favor of the party of the first part, and including all claims, damages and cause or causes of action for depreciation in the value of the said premises, and loss of rents or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railways.

And the party of the first part hereby grants and conveys to the parties of the last part, their
5118 successors and assigns, all such easement, interest, right or title in the said East 42nd Street, and the land forming the bed thereof, as are or may be necessary for the construction and maintenance of the elevated structure, and the operation of trains upon the elevated railways of the parties of the last part, as now constructed and operated; and the party of the first part hereby authorizes and consents to the maintenance of the said structure, and the operation of the said railway through said street, and past the premises hereinbefore described by the parties of the last part, their successors or assigns forever, without further com-

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pensation or further liability for any damages that may hereafter be sustained by the said premises, or by the owner or occupant thereof or by any person in privity of estate with the party of the first part, caused by said maintenance and operation of said railway, as now maintained and operated.

And the said party of the first part for his heirs, executors, administrators and assigns, does hereby covenant, promise and agree to and with the said parties of the last part, their successors and assigns, that the said parties of the last part, their 5120
successors and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above-granted interest or easement, and every part and parcel thereof, with the appurtenances without any let, suit, trouble, molestation, eviction or disturbance of the said party of the first part, his heirs or assigns.

In Witness Whereof the said party of the first part has hereunto set his hand and seal the day and year above written.

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James Hernon (Seal)

Acknowledged on May 9, 1890 by James Hernon.

Claimants' Exhibit "J-14"—Conveyance and Release, Alice M. O'Brien, etc. to N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas, William O'Brien, being seized in fee simple of the premises hereinafter described, subject only to the dower right of Margaret O'Brien, which ceased upon her death on December 16,

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1886, died on the 17th day of October, 1885, intestate, leaving him surviving his children, Philip J. O'Brien, otherwise known as Joseph W. O'Brien, Mary M. O'Brien, Alice M. O'Brien and John J. O'Brien, his only heirs-at-law; and

Whereas, by deed dated January 20, 1896, the said Joseph W. O'Brien conveyed his interest in said premises to Bridget D. Fitzpatrick, in trust, with remainder upon his death to the persons who would be entitled to take the same by descent; and

5123

Whereas, the said Joseph W. O'Brien died on September 19th, 1898, intestate, leaving him surviving John J. O'Brien and Alice M. O'Brien, his only heirs at law, and letters of administration upon his estate were duly issued to Alice M. O'Brien, which letters remain in full force; and

Whereas, said Mary M. O'Brien died on August 11, 1896, intestate, leaving her said brothers and sister her only heirs-at-law, and letters of administration on her estate were duly issued unto Bridget D. Fitzpatrick, which letters remain in full force; and

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Whereas, said John J. O'Brien and Alice M. O'Brien are now the owners in fee of said premises, which are bounded and described as follows, viz.:

Beginning at a point on the northerly side of 42nd Street one hundred fifty feet westerly from the corner formed by the intersection of the northerly side of 42nd Street with the westerly side of Third Avenue, and running thence northerly parallel with Third Avenue seventy-five feet and five inches; thence westerly parallel with 42nd Street twenty-five feet; thence southerly parallel

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with Third Avenue seventy five feet and five inches to the northerly side of 42nd Street, and thence easterly along the northerly side of 42nd Street twenty-five feet to the point or place of beginning, be the said several dimensions more or less

said premises being now known as No. 153 East 42nd Street, in the City of New York; and

Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the street adjacent thereto, as an open public street and an interest or estate in the land forming the bed of the said street; and

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Whereas, adjacent to the lands and premises above described the parties hereinafter named of the last part are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said parties of the first and second parts or which may hereafter arise to the said parties of the first part or their grantees, by reason of the construction, maintenance and operation of the said railroad adjacent to the said premises.

5127

Now, Therefore, this instrument made this 7th day of January, 1903, between Alice M. O'Brien and John J. O'Brien, unmarried, of New York City, parties of the first part, and the said Alice M. O'Brien, as Administratrix, &c. of Philip Joseph O'Brien (otherwise known as Joseph W. O'Brien), deceased, and Bridget D. Fitzpatrick, of the same

5128 place, as trustee for the said Philip Joseph O'Brien, parties of the second part and the New York Elevated Railroad Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part,

Witnesseth, That for and in consideration of the sum of Three thousand three hundred and eighty one 07/100 ($3381.07) dollars, the receipt whereof is hereby acknowledged, the parties of the first and second parts, hereby release the parties of the last
5129 part and each of them, from all claims, damages, and cause or causes of action, which now exist in favor of the parties of the first and second parts, or any of them and including all claims, damages, and cause or causes of action for depreciation in the value of the said premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railroad.

And the parties of the first part hereby grant
5130 and convey to the parties of the last part, their successors and assigns, all the right, title and interest of the said parties of the first part in said East 42nd Street and the land forming the bed thereof, and the easements therein, appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same is now constructed, maintained and operated, except as hereinafter stated; and the parties of the first part hereby authorize and consent to the maintenance of the said structure and the operation of

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the said railroad through the said street and past the premises hereinbefore described, by the parties of the last part, their successors or assigns forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the parties of the first part, caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated, except that the parties of the last part and their successors or assigns may at any time 5132
hereafter use, in the operation of their railroads, electricity or any other motive power, and may also make such repairs to or alterations in the present structure as they may deem expedient; provided, however, that in no case shall said structures or the operation of trains thereon, be changed, enlarged or added to, so as to materially increase the encroachments upon the easements hereby released and conveyed or the existing burden upon the abutting property herein above described.

And the said Alice M. O'Brien and John J. 5133
O'Brien covenant with the parties of the last part as follows:

First: That the said covenantors are seized in fee simple as tenants in common of the said property and have good right to convey the same.

Second: That the parties of the last part shall quietly enjoy the said property.

Third: That the said property is free from encumbrances.

Fourth: That the said covenantors will execute

5134 or procure any further necessary assurance of the title to the said property.

Fifth: That the said covenantors will forever warrant the title to the said property.

In Witness Whereof, the parties of the first and second parts have hereunto set their hands and seals the day and year first above written.

Alice M. O'Brien Individually and as Administratrix, &c. (Seal)

John J. O'Brien, (Seal).

5135 Bridget D. Fitzpatrick, as Trustee for Philip J. O'Brien now deceased (Seal).

Sealed and delivered in presence of

Witness as to Alice M. O'Brien John J. O'Brien & Bridget D. Fitzpatrick—Stephen F. Nash.

Acknowledged on January 9th, 1903 by Alice M. O'Brien John J. O'Brien and Bridget D. Fitzpatrick.

Claimants' Exhibit "J-15"—Conveyance, Margaret J. Westcott to N. Y. El. R. R. Co. & Manhattan Railway Co.

5136

Whereas, Margaret J. Westcott, acquired title in fee simple to certain premises hereinafter described by deed dated March 4th, 1878, and ever since said date has been and now is seized and possessed thereof; and

Whereas, the said premises are bounded and described as follows, viz.:

Beginning at a point on the northerly side of East Forty-second Street one hundred feet westerly from the corner formed by the intersection of the northerly side of East Forty ond street

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with the westerly side of Third Avenue, and running thence northerly parallel with Third Avenue one hundred feet and five inches to the centre of the block, and thence westerly parallel with Forty-second Street seventy-five feet; thence southerly parallel with Third avenue twenty-five feet; thence easterly parallel with Forty-second street twenty-five feet; thence southerly parallel with Third avenue seventy-five feet and five inches to the northerly side of East Forty-second street, and thence easterly along the northerly side of East Forty-second Street fifty feet to the point or place of beginning, be the said several dimensions more or less, said premises being now known as No. 155 East Forty-second street in the City of New York, and

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Whereas, appurtenant to said premises there are certain rights or easements to the enjoyment of the street adjacent thereto, as an open public street and an interest or estate in the land forming the bed of the said street; and

Whereas, adjacent to the lands and premises above described, the parties hereinafter named of the last part are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

5139

Whereas, the said Margaret J. Westcott did begin an action in the Supreme Court of the State of New York against the Manhattan Railway Company and the New York Elevated Railroad Company as defendants, and

Whereas, judgment was made and entered in said action on the 4th day of November, 1899, in favor of the plaintiff Margaret J. Westcott, and

5140 against the said defendants, for her costs therein, and

Whereas, in and by the said judgment it was further ordered, adjudged and decreed that the defendants in the said action, their agents, successors and assigns should be perpetually enjoined and restrained from maintaining or in any way using the elevated railway structure on Forty-second Street in front of and adjoining said premises known as No. 155 East Forty-second street in said city, and from operating trains of cars there-
5141 on on and after ninety days from the entry of said judgment except as in said judgment provided; and

Whereas, in and by said judgment it was further adjudged and decreed, that in case the defendants shall tender for the purpose of execution by the plaintiff, a form of conveyance or grant by plaintiff to defendants of the property of plaintiff, herein found by said Court to have been taken by defendants, and in case the plaintiff, having executed such conveyance, and grant, and having delivered or tendered for delivery the same to de-
5142 fendants, the defendants shall pay or tender to plaintiff the sum of Five thousand dollars with interest, from November 22nd, 1898, the date of trial of said action, then the judgment of injunction and restraint shall not in any way be operative, and also in case the plaintiff shall not execute and deliver or tender for delivery the said conveyance or grant at the time fixed for the defendants' tendering the said sum of Five thousand dollars with interest as aforesaid, the judgment of injunction and restraint shall not in any way be operative; and the defendants shall tender said

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form of conveyance or grant at least ten days before the expiration of the said ninety days and at the same time fix by written notice a time for the delivery of the conveyance or grant and payment of Five thousand dollars and interest which shall not be less than five days from the notice.

Now Therefore, this instrument made this 22nd day of December, 1899, between Margaret J. Westcott, party of the first part, and The New York Elevated Railroad Company and the Manhattan Railway Company corporations duly organized under the laws of the State of New York, parties of the last part, Witnesseth:

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Whereas, parties of the second part are desirous of complying with the terms of the said judgment and of acquiring an easement in the said East Forty-second street as an open public street, an interest or estate in the land forming the bed of said street appurtenant to the premises above described and of paying to the said Margaret J. Westcott, plaintiff as aforesaid, the sum of Five thousand dollars and interest from November 22nd, 1898, as in said judgment prescribed.

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Now, Therefore, for and in consideration of the sum of Five thousand dollars, to her in hand paid by the parties of the second part hereto, pursuant to the said judgment and decree, the receipt whereof is hereby acknowledged, the party of the first part hereto doth hereby grant and convey unto the parties of the second part hereto, all the right, title and interest of her, the said party of the first part of, in and to the said Forty-second street and the land forming the bed thereof appurtenant to the premises above set forth and the easements therein appurtenant to said premises which are

5146 or may be necessary for the maintenance and operation of the elevated railway of the parties of the second part as at the date of these presents the same is now constructed, maintained and operated.

And the party of the first part doth covenant with the parties of the second part hereto that she is seized of the premises Number 155 East Forty-second street above described, in fee simple and has good right to convey the same. And that the said property is free from encumbrance.

5147 In Witness Whereof, the party of the first part hath hereto set her hand and seal the day and year first above written.

Margaret J. Westcott (LS)

In presence of: E. M. Clarke.

(Documentary Stamp)

City and County of New York, ss.:

On this 22nd day of December, one thousand eight hundred and ninety-nine, before me personally appeared Margaret J. Westcott, to me known,

5148 and known to me to be the individual described in, and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same for the purposes therein mentioned.

E. M. Clarke, Notary Public, N. Y. County. (Seal)

5149

Claimants' Exhibit "J-16"—Conveyance and Release, Geo. Rothmann & Wife to N. Y. El. R. R. Co. & Manhattan Railway Co.

Whereas, George Rothmann acquired title in fee simple absolute to certain premises hereinafter described by four deeds three of which bear date March 22d, 1884, and the last of said deeds bearing date May 1st, 1886, and has been ever since and now is seized and possessed of the said premises, and

Whereas, the said premises are bounded and 5150
described as follows, viz.:

Beginning at the corner formed by the intersection of the northerly side of 42d Street with the westerly side of Third Avenue, and running thence westerly along the northerly side of 42d Street one hundred feet; thence northerly parallel with Third Avenue seventy-five feet one inch; thence easterly parallel with 42d Street or nearly so one hundred feet to the westerly side of Third Avenue and thence southerly along the westerly side of Third Avenue seventy-five feet and three inches to the point or place of beginning, be the said several di- 5151
mensions more or less, said premises being now known as Nos. 660, 662, 664 and 666 Third Avenue and 157, 159 and 161 East 42nd Street, in the City of New York; and

Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the streets adjacent thereto, as open public streets, and an interest or estate in the land forming the beds of the said streets; and

Whereas, adjacent to the lands and premises above described, the parties hereinafter named of

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the last part are maintaining and operating an elevated railroad constructed by them or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said parties of the first part or which may hereafter arise to the said parties of the first part or their grantees by reason of the construction, maintenance and operation of the

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said railroad adjacent to the said premises

Now, Therefore, this instrument made this 28th day of January, 1895, between George Rothmann and Mary Rothmann his wife of Sea Cliff, N. Y., parties of the first part and The New York Elevated Railroad Company and the Manhattan Railway Company, corporations duly organized under the laws of the State of New York, parties of the last part, Witnesseth: That for and in consideration of the sum of Six thousand five hundred dollars ($6,500), the receipt whereof is hereby ac-

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knowledged, the parties of the first part hereby release the parties of the last part and each of them, from all claims, damages, and cause or causes of action, which now exist in favor of the parties of the first part or any of them, and including all claims, damages and cause or causes of action for depreciation in the value of the said premises, and loss of rents, or rental value, and annoyance or injury to the owner or occupant, and interference with the use of the said premises, or the easements appurtenant to the same, produced by the construction, maintenance or operation of the elevated railroad.

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And, the parties of the first part, hereby grant and convey to the parties of the last part, their successors and assigns, all the right, title and interest of the said parties of the first part in said Third Avenue and 42nd Street, and the land forming the beds thereof, and the easements therein, appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said streets, as the same is now constructed, maintained and operated, and the parties of the first part hereby authorize and consent to the maintenance of the 5156
said structure and the operation of the said railroad through the said streets and past the premises hereinbefore described, by the parties of the last part, their successors or assigns forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the parties of the first part caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated.

And the said George Rothmann covenants with 5157
the parties of the last part as follows:

First: That the said covenantor is seized in fee of the said property, and has good right to convey the same.

Second: That the parties of the last part shall quietly enjoy the said property.

Third: That the said property is free from encumbrances except a mortgage given to secure the payment of $40,000.00.

Fourth: That the said covenantor will execute

or procure any further necessary assurance of the title to the said property.

Fifth: That the said covenantor will forever warrant the title to the said property.

In Witness Whereof the parties of the first part have hereunto set their hands and seals the day and year first above written.

Geo. Rothmann (Seal)
Mary Rothmann (Seal)

5159 Sealed and delivered in presence of:
August Hasser.

(Acknowledged on February 2, 1895 by George Rothmann and Mary Rothmann.)

Claimants' Exhibit "K" (Claimants' Exhibit "K" for Identification)—Memo. 42nd Spur—Franchise Value.

MEMORANDUM 42D STREET SPUR—FRANCHISE VALUE

Franchise value depends primarily on present
5160 and prospective earning capacity not alone of the spur itself but its contribution to the earnings of the system.

A—GENERAL INCREASE IN TRAFFIC.

1. All Rapid Transit Lines in New York City.

The total traffic on all lines for the year ending June 30, 1923 was 1,610,000,000.

The traffic had doubled in twelve years between July 1, 1911, and June 30, 1923.

In the seven preceding years from July 1, 1904 to June 30, 1911, it had doubled.

The average increase for the five years from

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July 1, 1918 to June 30, 1923, was 101,000,000 passengers per year.

See Exhibit "A".

2. Increase in Traffic of Interborough Rapid Transit.

The passengers carried on the Interborough Rapid Transit Company's lines for the year ending June 30, 1923, were 1,030,000,000.

The traffic has doubled in the fourteen years from July 1, 1909 to June 30, 1923.

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The average annual increase for the last five years from July 1, 1918 to June 30, 1923, has been 52,000,000 passengers per year.

The number of passengers carried in the ten months from July 1, 1923 to April 30, 1924, was 891,293,977, indicating a total for the year 1924 of 1,069,553,000 an increase of 3.8 per cent over the number carried during 1923.

The increase in the number carried during the fiscal year ending June 30, 1923 over the year ended June 30, 1922, was 31,682,441 or 3.2 per cent. The decrease in passengers carried during the fiscal year ending June 30, 1922, over the number carried for the year ending June 30, 1921, was 20,186,141 or 2.0 per cent.

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See Exhibit "B" showing the traffic on the Interborough Rapid Transit since 1905.

3. Manhattan Division of the Interborough Rapid Transit.

The number of passengers carried on the Manhattan Division, that is, the elevated portion of the Interborough Rapid Transit Company's lines, during the year ending June 30, 1923, was 350,000,000.

5164 Practically the same number were carried during the year ending June 30, 1922.

The number of passengers carried during the ten months from July 1, 1923, to April 30, 1924, was 298,012,697, indicating a total for the year ending June 30, 1924, of 358,000,000, an increase of 8,000,000 or 2.3 per cent over the number carried during the previous year.

The passengers carried by the Manhattan Division have doubled in the sixteen years since July 1, 1907.

5165 The number of passengers carried annually for the last five years has been practically stationary but is now showing a tendency to increase due to the fact that the natural growth of travel has reached the point where the competition of the New York Municipal Railways subway and the Lexington Avenue subway are neutralized.

Exhibit "C" shows the growth on the Elevated Division from 1880.

4. Traffic on the Third Avenue Line of the Elevated.

5166 The number of passengers carried on the 3d Avenue Line during the year ending June 30, 1923, was 139,932,143 or 40% of the total on the Division.

The number of passengers carried on this line during the ten months from July 1, 1923 to April 30, 1924, was 118,614,007, indicating a total for the year of 142,000,000, an increase of 2,000,000 or 1.5 per cent over the number carried during the previous year.

The average annual increase in the last five years from July 1, 1918 to June 30, 1923, has been 2,878,972 per year.

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Exhibit "C" shows the growth on the 3d Avenue Line since 1910.

CONCLUSION

The growth of traffic on all of these transportation facilities is tremendous and there is no evidence of cessation of growth at the present time.

With respect to the Elevated the tendency to large growth is intensified since competition, which has tended to reduce travel on the Elevated lines during the past five years appears now to be neutralized and no additional competition can be 5168
effective within five to eight years. The rate of growth on the Elevated lines should outstrip that on the Rapid Transit lines as a whole.

B—INCREASE IN TRAFFIC IN THE 42D STREET DISTRICT.

1. The ticket sales at all Rapid Transit stations in the 42d Street district, not including Grand Central Station of the New York Central Railroad and the railroads using that terminal, were, for the year ended June 30, 1923, 103,000,000.

The ticket sales have doubled in the seven years from July 1, 1916 to June 30, 1923. 5169

The ticket sales for the fiscal year ending June 30, 1923, were 8,542,672 or 9.07 per cent more than those for the corresponding twelve months ending June 30, 1922.

The average annual increase in the past five years from July 1, 1918 to June 30, 1923, has been 8,560,046.

Exhibit "D" shows the ticket sales at all the Rapid Transit lines in the 42d Street district.

2. Traffic on 42d Street Spur.

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The ticket sales on the spur for the year ending June 30, 1923, were 1,358,383.

The average yearly decrease for the five years from July 1, 1918 to June 30, 1923, was 60,816 tickets per year.

The number of tickets sold in the five months from July 1, 1923 to November 30, 1923, was 627,941, against 546,800 for the same period in 1922, showing an increase of 81,141 or 14.8 per cent. At this rate of increase the total for the year ending June 30, 1924 would have been 1,560,000.

5171

The increase in the number of tickets sold during the fiscal year ending June 30, 1923 over the year ending June 30, 1922, was 68,283; 5.3%.

Exhibit "G" shows the growth on the 42d Street spur since 1900.

3. Traffic at 42d Street Station on the Main Line of the 3rd Ave. "L".

The ticket sales at this station for the fiscal year ending June 30, 1923, were 3,683,883 or 7.04 per cent more than for the corresponding twelve months ending June 30, 1922.

5172

The average annual increase in the past five years from July 1, 1918 to June 30, 1923 has been 173,301.

The number of tickets sold at this station during the five months from July 1, 1923 to November 30, 1923 was 1,722,907 compared with 1,478,100 for the same period in the previous year, showing an increase of 244,807 or 16.6 per cent. At this rate of increase the ticket sales for the year ending June 30, 1924 would normally be 4,295,000. The actual total should, however, be greater than this on account of the absorption of some of the spur traffic.

Exhibit "G" shows the growth at this station since 1900.

5173

C—Loss of Passengers Due to Cessation of Operation of Spur.

Trains on the 3d Avenue Elevated either run direct or connect to points in common with the Lexington Avenue subway on the West Farms Lines between Jackson Avenue and East 241st Street, and by means of free transfers at 149th Street subway passengers may take the 3d Avenue Elevated for points on the 3d Avenue line and Webster Avenue between 149th Street and Gun Hill Road.

5174

Therefore, the Lexington Avenue subway and the 3d Avenue Elevated are in competition not only from South Ferry to 129th Street but also to points on the lines described. These are the only lines between which this direct competition exists.

The distances from 42d Street to important points on 3d Avenue Line are:

42d Street to South Ferry	4.11 miles
42d Street to 149th Street	5.59 miles
42d Street to 143d Street	5.27 miles
42d Street to 149th Street	5.59 miles
To Gun Hill Road via 3d Ave. Line	11.07 miles
To Gun Hill Road via West Farms Line	11.50 miles
To East 241st St. via 3d Ave. Line	13.03 miles
To East 241st St. via West Farms Line	13.50 miles

5175

1. Explanation of Exhibits

Exhibits "E", "F" and "G" show sales at the Spur Station, 3d Ave. and 42d Street Station and at the combined Spur and 3d Ave. Stations.

5176 Exhibit "E" shows the total ticket sales for succeeding twelve-month periods, ending with the months indicated at the bottom of the chart. That is to say, the total spur sales of 1,309,160 shown for March 1923 represents a year's sales beginning April 1, 1922 and ending March 31, 1923. In the same way the spur sales of 1,439,524 shown for November 1923 represent the total for the year beginning December 1, 1922 and ending November 30, 1923. All three curves on this exhibit are plotted on the same principle. As will be seen,
5177 traffic has been increasing at a practically uniform rate between March and November 1923 and the average rate of increase of these eight 12 month periods has been used to establish the normal trend lines on the diagrams. From this average normal trend the yearly normal totals have been computed for the 12 month periods subsequent to November 1923, which was the last full month of spur operation. The actual sales are then subtracted from the estimated normal sales for the periods to show the losses in the case of the spur and of the combined stations, or vice versa to show the gain at
5178 the 3d Ave. Station where the sales have increased above normal since the closing of the spur. The losses and gains are then divided by the number of days in which they have occurred (that is, since the date of December 6, when spur operation ceased) in order to give the average daily loss or gain since cessation of spur operation. Thus for the twelve-month period ending February 1924 the average daily loss of spur sales is shown to be 4,043 of which an average of 2,513 have been regained at the 3d Avenue Station, leaving an average net loss for the combined stations of 1,530. It must be clearly remembered that the losses and

5179

gains shown on the chart are not single monthly values but are averages in which weight is given to traffic over twelve-month periods. The purpose of constructing the chart in this manner is to eliminate the fluctuations of seasonal monthly figures and, by considering twelve-month periods, to establish a true average trend of growth which gives weight not only to growth in the immediate month involved, but to growth in the preceding eleven months as well.

Exhibit "F" shows curves of actual monthly sales at each of the stations involved and of the combined stations. The dotted lines on this Chart show the average normal trend lines as established on Exhibit "A."

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Exhibit "G" shows curves of actual yearly sales from 1900 to 1923 for the fiscal years ending June 30. The dotted lines indicate the average trend lines as established on Exhibit "A." It will be noticed that the average trend of present growth is closely parallel to that in the years 1916 to 1917 before the Lexington Ave. Subway was opened. The effect of the opening of new subways on elevated traffic at these stations is clearly indicated. Now that the increasing demands of traffic have congested the existing subways, so that their rate of growth is falling while that of the elevated lines is rising rapidly, all indications point to a repetition of the growth of elevated traffic at these stations similar to that experienced prior to the opening of the Lexington Avenue Subway.

5181

Exhibit "H" shows graphically the present rates of growth at elevated and subway stations in the 42d Street District. This chart shows the true trend of increase as it is based, like Exhibit "A," on twelve-month periods ending with the months indicated.

2. Loss of Eastbound Spur Sales

Basis A.

The following table gives the actual growth at stations in the 42d St. area for various periods since January 1923 over corresponding periods in the previous year:

				Combined					
			Spur Station	3rd Ave. & 42nd St.	Spur & 3rd Ave.	42nd St. & 2nd Ave.	G.C.T. Subway Stations	Times Square Subway	All 42nd St. Subway Stations
6	Month	Jan.-June	10.4%	11.6%	11.3%	11.6%	10.1%	7.7%	8.8%
11	"	Jan.-Nov.	12.4%	13.9%	13.5%	13.8%	9.4%	7.7%	8.4%
5	"	July-Nov.	14.8%	16.6%	16.1%	16.4%	8.6%	7.7%	8.1%
5	"	Dec. 1923 to Apr. 1924	Closed	40.1%*	3.4%*	17.8%	8.2%	7.8%	7.9%

NOTE: * Reflects gains and losses due to discontinuance of spur.

The close similarity between the growth at the Combined Spur & 3d Ave. Stations and that at 42d St. and 2d Avenue, makes the 2d Avenue Station a very accurate criterion of what might have been expected at the combined stations had the spur remained in operation. The percentages of growth at 2d Avenue are in all cases prior to November 1923, just three tenths of one per cent higher than they were at the combined stations. On this basis the growth at the combined stations for the five months, December 1923 to April 1924, would have been 17.5%. Estimating on this basis the traffic at the combined stations for the five months would have been:

Dec. 1922 to April 1923	Increase	Dec. 1923 to April 1924
2,059,836	17.5%	2,420,307

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The actual ticket sales were:

Spur Station	25,243	
3d Ave. Station	2,104,388	2,129,631
Showing a loss in sales for 146 days of		290,676
An average daily loss since closing of spur of		1,991

The spur sales from December 1922 to April 1923 were 557,823 which if increased by 17.5% would give a normal spur traffic of 655,442 or 4,312 per day. The average loss has therefore been 46.2%.

5186

Basis B.

On the basis of the average yearly figures on Exhibit "A," the loss for the five months since spur discontinuance is shown to be 1,943 per day or 46% of the estimated normal spur traffic. While the method used for constructing this chart (viz twelve-month periods) will give a true result over a twelve month period, it will not give a really true average until a full twelve months have elapsed since the spur was abandoned. It will be noticed that the average daily losses as shown by this chart are increasing. This is logical because at the start the figures contain eleven months in which no losses occurred while each succeeding month lessens the number of non-loss months and increases the number of months in which there actually was loss. For the same reasons the gains at the 3d Avenue Station are showing a decrease for each period. It will therefore not be possible before December 1924 to state actually what the average loss for the twelve month period has been, but if it keeps on increasing at the same rate the average

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5188 loss in the twelve month period ending December 1924 should be

$$\frac{1943-974\times366}{146}=2{,}429 \text{ per day}$$

This is equivalent to 53.7% of the estimated average daily normal traffic for the year ending December 1924.

This seems a reasonable result in view of the fact that Basis A gives a loss of 46.2% for the five month period, December to April, which, in the 5189 light of previous years, should be below the yearly average. It would seem fair to establish a loss of 50% as a result of the preceding analyses.

3. TOTAL TRAFFIC LOSS.

The eastbound spur traffic loss at 50% of the normal traffic is:

Present loss based on year ending June 30, 1924	778,400
Year ending June 30, 1918 the previous high point in recent years	931,200
Year ending June 30, 1904 the maximum reached by the spur	1,136,700

5190 A study of the traffic chart for the combined spur and 3d Avenue Station (Exhibit "G") shows that traffic rose steadily from 1900 to 1904 when the first subway was opened. It then fell off rapidly to a low point in 1906. From 1906 to 1915 the traffic readjusted itself to subway competition showing a slow gain marked by somewhat irregular yearly fluctuations. Since 1915, when the elevated third tracking was put in operation, the traffic has shown a rapid and steady growth. In 1917 there was a falling off in the rate of growth on account of the opening of the Lexington Avenue Subway. This continued till 1919 when the rate again rose and has continued to grow until the present time, with the exception of a drop in 1922,

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which was common to all rapid transit lines in Manhattan. This drop can only be accounted for by the period of general industrial depression through which the country was passing at that time, coupled with a considerable shift of population to Brooklyn and Queens in that year, owing to the greater relief from the housing shortage offered in those Boroughs of the City. Since 1922 the upward growth has been resumed at an ever increasing rate. While the 3d Avenue Station, on account of the increased capacity and convenience of its third track express system, contributed all

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of the increase from the time the Lexington Avenue subway was opened in 1917 up to 1922, the spur traffic has grown steadily and rapidly since 1922 and, at date of acquisition by the City, was increasing at the same rate as that of the 42d Street Station of the 3d Avenue line.

The Grand Central Terminal subway stations on the other hand, have, since July 1923, shown a marked falling off in the rate of growth in ticket sales. The rates of growth for the stations serving the Grand Central Terminal area in December 1923 were:

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Spur Station	18.3%
3d Ave. Elevated	18.4%
Subway Stations	8.3%

The evidence of these figures, together with the well known fact of subway congestion, is that elevated traffic will continue to grow at least until more subways are built.

The estimated spur traffic for future years based on Exhibit "A" is

Year ending June 30, 1924	1,556,808
Year ending June 30, 1925	1,751,718
Year ending June 30, 1926	1,946,628
Year ending June 30, 1927	2,141,538
Year ending June 30, 1928	2,336,448

5194 The maximum previous sales occurred in 1904 when the sales reached 2,273,486.

The discontinuance of the spur, however, affects not only the eastbound traffic but also the westbound traffic which had its origin at stations above or below 42d Street on the 3d Avenue line.

The count of spur passengers made by the I. R. T. on December 3 to 6, inclusive, 1923, established a daily average for those days of 5,062 actual eastbound and 8,959 actual westbound passengers using the spur. The ratio of total to eastbound
5195 passengers was 14,021 to 5,062 or 277%. This ratio compares with the count made by the I. R. T. on March 18 and 22nd, 1921 on the same basis when the ratio found was 298%, and also with a count made by the Public Service Commission on March 23d, 1921, when a ratio of 255% was found between total counted passengers and actual eastbound ticket sales. The actual ticket sales on December 3 to 6 was 19,082, an average of 4,770 per day as against the total count of 14,021, a ratio of 294%.

Ticket sales and actual passengers in any one di-
5196 rection would no doubt tend to equalize if compared over longer period than those in which the counts were made, so that it appears conservative to use the ratio of 277% established by the latest count.

The total traffic loss due to spur discontinuance therefore is:

Year ending June 30, 1924	778,400	x 2.77	= 2,156,168
Year ending June 30, 1918	931,200	x 2.77	= 2,579,424
Year ending June 30, 1904	1,136,700	x 2.77	= 3,148,659

4. LOSS IN NET REVENUE.

Apart from the cost of operating the spur shown on Table III, the only saving that will be made, due to discontinuance of spur operation, is the cost of hauling the passengers lost, to and from destination on the 3d Avenue line. No trains have been taken off the 3d Avenue line since discontinuance, so that the operating cost of that line remains unaffected except as stated above. Table IV gives the average cost of hauling a passenger during the last six months of 1923.

The estimated loss in Net Revenue will therefore be as follows: 5198

A—On Basis of Average Loss Year Ending June 30, 1924		
Losses		
Gross Revenue lost—2,156,168 passengers at 5c. =		$107,800
Savings		
Cost of Operation Table III	$41,230	
Power hauling 2,156,168 passengers on 3d Avenue @ $.0004732 each = ...	1,020	42,250
Total Net Loss per Year		$ 65,550
B—On Basis of Average Loss Year Ending June 30, 1918		
Losses		
Gross Revenue lost—2,579,424 passengers at 5c. =		$128,970
Savings		
Cost of Operation Table III	$41,230	
Power hauling 2,579,424 passengers on 3d Avenue @ $.0004732 each = ...	1,220	42,450
Total Net Loss per Year		$ 86,520
C—On Basis of Average Loss Year Ending June 30, 1904		
Losses		
Gross Revenue lost—3,148,659 passengers at 5c. =		$157,430
Savings		
Cost of Operation Table III	$41,230	
Power hauling 3,148,659 passengers on 3d Avenue @ $.0004732 each = ...	1,490	42,720
Total Net Loss per Year		114,710

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5. RECAPITULATION.

The loss in Net Revenue to the Interborough Rapid Transit Company due to discontinuance of spur operation is estimated to be at the rate of $65,550 per year in the year of discontinuance, and at the rate of $114,700 in the year when it again would have reached the maximum traffic of 1904.

D.—CONCLUSIONS.

The cessation of operation of the 3d Avenue spur has already caused the net loss of revenue to the Manhattan Division. This loss will increase as traffic increases.

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This loss of revenue to the Manhattan Division is important to the Stockholders of the Manhattan Railway Company as it directly effects the amount of rental which they are to receive from the Interborough Rapid Transit Company under the terms of the "Plan of Readjustment" dated November 12, 1922.

This perpetual franchise has other value not so easily translated into terms of money. It is conceivable that the time may come when it will be desirable to extend this spur to Second Avenue to connect with the Second Avenue Elevated, as well as the Third Avenue Elevated, so as to disseminate the traffic originating in the 42d Street district.

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The value of the easements for the portion of the spur between 3d Avenue and Park Avenue is probably the greater part of the value of all the easements that will be necessary from Second Avenue to Park Avenue.

Claimants' Exhibits. 5203

Ticket Sales at I. R. T. Stations Serving G. C. Terminal Area.

Note: The percentages of increase shown are those over the corresponding periods of the previous year.

Period 1922	42nd St. Spur Total	42nd St. Spur Daily	42nd St. Spur % Incr.	3rd Ave. Elevated 42nd St. Station Total	3rd Ave. Elevated 42nd St. Station Daily	3rd Ave. Elevated 42nd St. Station % Incr.	Subway Stations G. C. Terminal Total	Subway Stations G. C. Terminal Daily	Subway Stations G. C. Terminal % Incr.
July	108,100	3,487		277,400	8,948		2,222,341	71,688	
August	112,040	3,614		284,410	9,175		2,296,744	74,089	
September	112,760	3,759		296,790	9,893		2,450,969	81,698	
October	111,740	3,605		319,600	10,310		2,744,548	88,534	
November	102,160	3,405		299,900	9,997		2,735,907	91,196	
December 1-6	21,340	3,557		59,460	9,910		574,204	95,701	
December 7-31	87,000	3,480		243,540	9,742		2,401,519	96,061	
Total December	108,340	3,495		303,000	9,774		2,975,723	95,991	
January 1923	110,360	3,560		297,800	9,606		3,083,435	99,466	
February	97,200	3,471		262,900	9,389		2,699,746	96,419	
March	117,920	3,804		310,100	10,003		3,090,021	99,678	
April	124,003	4,133		328,213	10,940		2,885,414	96,180	
May	127,803	4,123		355,546	11,469		2,845,351	91,786	
June	125,957	4,199		348,224	11,607		2,722,985	90,765	
Total Fiscal Year 1922-3	1,358,383	3,722	+ 5.3	3,683,883	10,093	+ 7.0	32,753,214	89,735	
July	121,417	3,917	+12.3	322,741	10,411	+16.4	2,442,587	78,793	+ 9.9
August	124,055	4,002	+10.7	331,716	10,701	+16.6	2,426,774	78,283	+ 5.7
September	123,433	4,114	+ 9.4	339,557	11,318	+14.4	2,567,852	85,594	+ 4.8
October	135,594	4,374	+21.3	376,827	12,156	+17.9	3,102,208	100,071	+13.0
November	123,442	4,115	+20.9	352,066	11,735	+17.4	3,009,837	100,327	+10.0
Actual December 1-6	25,243	4,207	+18.3	70,387	11,731	+18.4	623,046	103,841	+ 8.5
Actual December 7-31	Closed	....	...	360,811	14,432	+48.1	2,575,477	103,018	+ 7.2
Actual Month of December	25,243	....	...	431,198	13,910	+42.3	3,198,523	103,178	+ 7.5
Actual December 1-6	25,243	4,207	+18.3	70,387	11,731	+18.4	623,046	103,841	+ 8.5
Estimated Normal Dec. 7-31 Based on same period in 1922 at ratios of increase as found for Dec. 1-6	102,900	4,116	+18.3	288,300	11,532	+18.4	2,605,900	104,236	+ 8.5
Month of December Estimated normal with Spur in operation	128,143	4,134	+18.3	358,687	11,571	+18.4	3,228,946	104,160	+ 8.5
Difference between Actual and Estimated normal sales for 25 days Dec. 7-31 incl.	—102,900	—4,116		+72,511	+2,900		—30,423	—1,218	

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Note: Estimated Net Loss to Elevated Stations 25 days December 30,389 or 1,216 per day.
" " " to All Stations " " 60,812 or 2,424 " "

5206 *Claimants' Exhibits.*

COST OF OPERATING 42d STREET SPUR

	Maintenance of Way	Items varying as Track Miles	Items varying as Car Miles	Total Chargeable to Spur
		$	$	$
1	Salaries—Eng. Dept.	121,776.27		495.62
2	Expenses—Eng. Dept.	5,762.61		23.45
4	Ties	34,758.16		141.46
5	Running Rails		12,468.76	13.29
6	Guard Rails	23,182.88		94.35
7	Rail Fastenings & Joints		35,354.34	37.68
8	Special Work		4,059.31	4.32
9	Roadway & Track Labor	204,215.37		831.16
	" " "		68,071.79	72.56
10	Misc. Roadway & Track Expenses	29,173.10		94.31
	" " " "		7,724.36	8.23
11	Cleaning and Sanding Track	5,238.40		21.32
5207 12	Removal of snow, ice & sand	11,988.67		48.79
18	Elevated Structure Repairs	345,891.47		1,407.78
19	Elevated Structure Painting	50,578.45		205.85
21	Signal and Interlocking Repairs	223,396.39		909.22
22	Telephone & Telegraph Repairs	21,275.01		86.59
23	Other Miscellaneous Way Ex.		70,985.31	75.66
24	Underground Conduit Repairs		9,779.04	10.42
25	Transmission System Repairs		1,662.07	1.77
26	Overhead Feeder Repairs		2,012.16	2.14
27	Underground Feeder Repairs		1,016.47	1.08
28	Track Bonding	6,262.58		25.49
29	Third Rail and Fixtures	59,015.56		240.19
30	Miscellaneous Electric Line Ex.		12,255.89	13.06
31	Power Station Repairs		4,700.95	5.01
32	Sub-Station Repairs		1,512.40	1.61
33	Shop Repairs		29,759.36	31.72
34	Stations, etc. Repairs	161,954.21	Ratio to all stations	1,245.80
35	Dock and Wharves Repairs		2,850.43	3.04
36	Other Buildings Repairs		19,702.49	21.00
5208 37	Joint Way and Structure		61,106.38	65.13
	Total	161,954.12	1,136,514.92	345,021.51	1,643,490.64
	Portion Chargeable to Spur	1,245.80	4,625.62	367.76	6,239.11

Car Miles System.	65,061,092	Track Miles System	99.23	No. Station System....	130
Car Mile Spur....	69,350	Track Miles Spur...	0.4043	No. Station Spur.....	1
% Spur to System	.1066	% Spur to System..	.407	% Spur to System.....	.769

COST OF OPERATING 42d STREET SPUR

	Maintenance of Equipment	Items varying as Track Miles $	Items varying as Car Miles $	Total Chargeable to Spur $
1	Salaries, Motive Power Dept.		22,456.40	23.94
2	Expenses, Motive Power Dept.		639.43	0.68
3	Salaries, Car Equipment Dept.		109,198.75	116.40
4	Expenses, Car Equipment Dept.		10,038.24	10.70
5	Furnaces, Boilers & Accessories, Repairs		133,836.60	142.66
6	Steam Engines, Repairs		11,991.68	12.78
7	Power Plant Elec. Equipment Repairs		10,696.06	11.40
8	Misc. Power Plant Equipment Repairs		6,011.69	6.41
9	Sub-Station Equipment Repairs		4,491.42	4.79
10	Passenger & Combination Cars, Repairs		639,318.06	681.46
12	Locomotives, Repairs		94.54	0.10
13	Service Cars, Repairs		4,761.41	5.07
14	Elec. Equipment of Cars, Repairs		440,490.03	469.53
15	Shop Machinery & Tools, Repairs		8,783.17	9.36
16	Shop Expenses		198,456.18	211.54
17	Vehicles, Repairs		8,691.28	9.26
18	Other Misc. Equipment Expenses		5,053.85	5.39
	Total		1,615,008.79	1,721.47
	General Expenses Total		912,069.96	972.19
	Traffic Total		586.05	.62

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5212 *Claimants' Exhibits.*

COST OF OPERATING 42d STREET SPUR

	Transportation		Items varying as Track Miles $	Items varying as Car Miles $	Total Chargeable to Spur $
1	Salaries, Superintendent's Dept.			289,138.47	308.20
2	Expenses, Superintendent's Dept.			13,693.18	14.60
5	Labor, Power Plant			407,403.31	434.26
6	Labor, Sub-Stations			80,274.35	85.57
7	Fuel for Power			3,028,097.94	3,227.71
8	Water for Power			10,624.56	11.32
9	Lubricants for Power			9,579.83	10.21
10	Misc. Power Plant Supplies & Expenses			43,752.83	46.64
11	Sub-Station Supplies & Expenses			11,677.18	12.66
12	Power Purchased			140.19	0.15
14	Power Exchanged—Balance			1,634,817.76	1,742.59
16	Passenger Motormen			See Summary	
5213 17	Passenger Conductors & Guards			See Summary	
19	Misc. Car Service Employees			See Summary	
20	Lubricants and Waste for Cars			18,131.33	19.33
21	Light for Cars			24,494.70	26.11
22	Car Cleaning Supplies			3,687.96	3.93
23	Cost Tickets	32,453.27	Ratio to all tickets		249.64
24	Other Car Supplies & Expen.			63,604.83	67.80
25	Station Employees			See Summary	
26	Station Expenses	97,078.35	Ratio to all stations		746.76
27	Car House Inspection Labor			180,761.53	192.68
28	Car Cleaners			103,246.67	110.05
29	Lamp Trimmers			19,097.81	20.36
31	Oper. of Signal & Interlocking		262,274.45		1,067.45
32	Oper. of Telephone & Telegraph		15,461.40		62.93
34	Other Transportation Expenses			41,561.64	44.30
35	Joint Operation of Cars, Dr.			231,447.18	246.70
	Total	129,531.62	277,735.85	2,945,797.73	
	Total Chargeable to Spur	996.40	1,130.38	3,139.99	5,266.77

5214

Tickets Collected System	348,524,700
Tickets Collected Spur	1,358,383
% Spur to System	.3897

NOTE: Figures in dark type are red in original.

Claimants' Exhibits.

5215

COST OF OPERATING 42d STREET SPUR

SUMMARY

			L & M	Labor Only	5% Wage Increase	L & M + Wage Increase
M/W	Labor	74.048%	6,239.11	4,619.94	230.99	6,470.10
M/E	Labor	67.482%	1,721.47	1,161.68	58.08	1,779.55
Transportation	Labor	60.00%	5,266.77			
*Transportation	Labor	100.00%	25,291.62	28,451.68	1,422.58	31,980.97
Traffic	Labor	100.00%	2.38	2.38	.12	2.50
General	Labor	50.00%	972.19	486.09	24.30	996.49
Total Cost of Operation						41,229.61

* From S. D. Smith, covers Passengers, Motormen, Conductors and Guards, Miscel. Car Service Employees, and Station Employees.

5216

TABLE IV.

COST OF HAULING SPUR PASSENGERS OVER THE 3d AVE. LINE

Cost of Power on Manhattan System.
Six Months Ended Dec. 31, 1923.

Account #5—Labor Power Plant	$ 209,806
Account #6—Labor Substations	41,616
Account #7—Fuel for power	1,348,932
Account #8—Water for power	5,688
Account #9—Lubricants for power	3,994
Account #10—Miscellaneous Power Plant Supplies & Expenses	24,332
Account #11—Substation Supplies & Expense	6,600
Account #12—Power Purchased	18
	1,640,986
Less Account #14 Power Exchanged (Used by subway)	953,548
Total Cost Manhattan System	$ 687,438

5217

Passengers Carried in Same Period		178,682,743
Cost per passenger including weight of Cars		$ .003847
During this period:		
Average Cars per Train	was	5.007
Average Passengers per train	was	294.4
Average Passengers per car	was	58.8
The relative weight of passengers & cars therefore was:		
Car weight without passengers	58,500 lbs. =	87.7%
Passengers 58.8 x 140 lbs.	8,232 lbs. =	12.3%
Total per car	66,732 lbs.	100.

Average Cost of Hauling Each Passenger was, therefore, 12.3% of $.003847 = $ .0004732

NOTE: General expenses not included as they are not affected by loss of spur passengers.

5218 *Claimants' Exhibits.*

Claimants' Exhibit K-1—Chart.

(This chart is printed at page 1910 of the record.)

Claimants' Exhibit K-2—Chart.

(This chart is printed at page 1912 of the record.)

Claimants' Exhibit K-3—Chart.

(This chart is printed at page 1914 of the record.)

5219

Claimants' Exhibit K-4—Chart.

(This chart is printed at page 1916 of the record.)

Claimants' Exhibit K-5—Chart.

(This chart is printed at page 1918 of the record.)

Claimants' Exhibit K-6—Chart.

5220 (This chart is printed at page 1920 of the record.)

Claimants' Exhibit K-7—Chart.

(This chart is printed at page 1922 of the record.)

Claimants' Exhibit K-8—Chart.

(This chart is printed at page 1924 of the record.)

Claimants' Exhibit "L"—Cost of Operating 42nd St. Spur.

TABLE III.

COST OF OPERATING 42d STREET SPUR

	Maintenance of Way	Items varying as Track Miles $	Items varying as Car Miles $	Total Chargeable to Spur $	
1	Salaries—Eng. Dept.	121,776.27		495.62	
2	Expenses—Eng. Dept.	5,762.61		23.45	
4	Ties	34,758.16		141.46	
5	Running Rails		12,468.76	13.29	
6	Guard Rails	23,182.88		94.35	
7	Rail Fastenings & Joints		35,354.34	37.68	
8	Special Work		4,059.31	4.32	5222
9	Roadway & Track Labor	204,215.37		831.16	
	" " " "		68,071.79	72.56	
10	Misc. Roadway & Track Expenses	23,173.10		94.31	
	" " " "		7,724.36	8.23	
11	Cleaning and Sanding Track	5,238.40		21.32	
12	Removal of snow, ice & sand	11,988.67		48.79	
18	Elevated Structure Repairs	345,891.47		1,407.78	
19	Elevated Structure Painting	50,578.45		205.85	
21	Signal and Interlocking Repairs	223,396.39		909.22	
22	Telephone & Telegraph Repairs	21,275.01		86.59	
23	Other Miscellaneous Way Ex.		70,985.31	75.66	
24	Underground Conduit Repairs		9,779.04	10.42	
25	Transmission System Repairs		1,662.07	1.77	
26	Overhead Feeder Repairs		2,012.16	2.14	
27	Underground Feeder Repairs		1,016.47	1.08	
28	Track Bonding	6,262.58		25.49	
29	Third Rail and Fixtures	59,015.56		240.19	
30	Miscellaneous Electric Line Ex.		12,255.89	13.06	
31	Power Station Repairs		4,700.95	5.01	
32	Sub-Station Repairs		1,512.40	1.61	5223
33	Shop Repairs		29,759.36	31.72	
34	Stations, etc., Repairs	161,954.21	Ratio to all stations	1,245.80	
35	Dock and Wharves Repairs		2,850.43	3.04	
36	Other Buildings Repairs		19,702.49	21.00	
37	Joint Way and Structure		61,106.38	65.13	
	Total	161,954.12	1,136,514.92	345,021.51	1,643,490.64
	Portion Chargeable to Spur	1,245.80	4,625.62	367.76	6,239.11

Car Miles System	65,061,092	Track Miles System	99.23	No. Station System	130
Car Mile Spur	69,350	Track Miles Spur	0.4043	No. Station Spur	1
% Spur to System	.1066	% Spur to System	.407	% Spur to System	.769

5224

Claimants' Exhibits.

TABLE III.

COST OF OPERATING 42d STREET SPUR

	Maintenance of Equipment	Items varying as Track Miles $	Items varying as Car Miles $	Total Chargeable to Spur $
1	Salaries, Motive Power Dept.		22,456.40	23.94
2	Expenses, Motive Power Dept.		639.43	0.68
3	Salaries, Car Equipment Dept.		109,198.75	116.40
4	Expenses, Car Equipment Dept.		10,038.24	10.70
5	Furnaces, Boilers & Accessories, Repairs		133,836.60	142.66
6	Steam Engines, Repairs		11,991.68	12.78
7	Power Plant Elec. Equipment Repairs		10,696.06	11.40
8	Misc. Power Plant Equipment Repairs		6,011.69	6.41
9	Sub-Station Equipment Repairs		4,491.42	4.79
5225 10	Passenger & Combination Cars, Repairs		639,318.06	681.46
12	Locomotives, Repairs		94.54	0.10
13	Service Cars, Repairs		4,761.41	5.07
14	Elec. Equipment of Cars, Repairs		440,490.03	469.53
15	Shop Machinery & Tools, Repairs		8,783.17	9.36
16	Shop Expenses		198,456.18	211.54
17	Vehicles, Repairs		8,691.28	9.26
18	Other Misc. Equipment Expenses		5,053.85	5.39
	Total		1,615,008.79	1,721.47
	General Expenses Total		912,069.96	972.19
	Traffic Total		586.05	.62

5226

TABLE III.

COST OF OPERATING 42d STREET SPUR

	Transportation		Items varying as Track Miles $	Items varying as Car Miles $	Total Chargeable to Spur $	
1	Salaries, Superintendent's Dept.			289,138.47	308.20	
2	Expenses, Superintendent's Dept.			13,693.18	14.60	
5	Labor, Power Plant			407,403.31	434.26	
6	Labor, Sub-Stations			80,274.35	85.57	
7	Fuel for Power			3,028,097.94	3,227.71	
8	Water for Power			10,624.56	11.32	
9	Lubricants for Power			9,579.83	10.21	
10	Misc. Power Plant Supplies & Expenses			43,752.83	46.64	
11	Sub-Station Supplies & Expenses			11,877.18	12.66	
12	Power Purchased			140.19	0.15	5228
14	Power Exchanged—Balance			1,634,817.76	1,742.59	
16	Passenger Motormen			See Summary		
17	Passenger Conductors & Guards			See Summary		
19	Misc. Car Service Employees			See Summary		
20	Lubricants and Waste for Cars			18,131.33	19.33	
21	Light for Cars			24,494.70	26.11	
22	Car Cleaning Supplies			3,687.96	3.93	
23	Cost Tickets	32,453.27		Ratio to all tickets	249.64	
24	Other Car Supplies & Expen.			63,604.83	67.80	
25	Station Employees			See Summary		
26	Station Expenses	97,078.35		Ratio to all stations	746.76	
27	Car House Inspection Labor			180,761.53	192.68	
28	Car Cleaners			103,246.67	110.05	
29	Lamp Trimmers			19,097.81	20.36	
31	Oper. of Signal & Interlocking		262,274.45		1,067.45	
32	Oper. of Telephone & Telegraph		15,461.40		62.93	
34	Other Transportation Expenses			41,561.64	44.30	
35	Joint Operation of Cars, Dr.			231,447.18	246.70	
	Total	129,531.62	277,735.85	2,945,797.73		5229
	Total Chargeable to Spur	996.40	1,130.38	3,139.99	5,266.77	

Tickets Collected System	348,524,700
Tickets Collected Spur	1,358,383
% Spur to System	.3897

NOTE: Figures in dark type are red in original.

5230 *Claimants' Exhibits.*

TABLE III.

COST OF OPERATING 42d STREET SPUR

SUMMARY

			L & M	Labor Only	5% Wage Increase	L & M + Wage Increase
M/W	Labor	74.048%	6,239.11	4,619.94	230.99	6,470.10
M/E	Labor	67.482%	1,721.47	1,161.68	58.08	1,779.55
Transportation	Labor	60.00%	5,266.77			
*Transportation	Labor	100.00%	25,291.62	28,451.68	1,422.58	31,980.97
Traffic	Labor	100.00%	2.38	2.38	.12	2.50
General	Labor	50.00%	972.19	486.09	24.30	996.49
Total Cost of Operation						41,229.61

5231 * From S. D. Smith, covers Passengers, Motormen, Conductors and Guards, Miscel. Car Service Employees, and Station Employees.

5232

Claimants' Exhibit "M"—Tabulation of Burpee's Testimony on Value.

COST TO REPRODUCE AND DEPRECIATED VALUE
AS OF DECEMBER 7, 1923,
OF THE
42nd STREET ELEVATED SPUR FROM PARK TO THIRD AVENUE.

Includes structures pertaining to the Elevated Railroad within the lines of the Condemnation Area, exclusive of the Underground Duct Line and Cables for feeding the Queensboro Subway, and exclusive also of Elevated Structures outside the Condemnation Area rendered useless by the removal of the Spur and the re-construction of the Southbound Station at 3rd Avenue.

Item		Unit	Cost to Reproduce	Depreciation %	Depreciation Amount	Depreciated Value
Foundations	45		$27,406			$27,406
Base Castings & Fenders	124060#		12,406	11.5	$1,426	10,980
Steel	629.62 T	$120	75,554	11.5	8,689	66,865
Drip Pans	2464 S.F.	50c.	1,232	30.0	370	862
Down Spouts			Included in price for Drip Pans			
Track—rails, joints, signals and bumper blocks			12,227	65.7 (av)	8,036	4,191
Deck—Ties, guard timber, track platform, etc.			15,755	67.7 (av)	10,664	5,091
Electrical Distribution			7,577	35.0	2,652	4,925
Station Buildings, Platforms, Stairways and Canopies			28,175	32.9 (av)	9,258	18,917
			$180,332		$41,095	$139,237
Contingencies 5%			9,017		2,055	6,962
			$189,349		$43,150	$146,199
General Expenses:						
Preliminary & organization, Engineering, superintendence, and legal			18,000		1,000	17,000
Interest during construction			4,865			4,865
Cost of Financing			8,842			8,842
Total			$221,056		$44,150	$176,906

5234

5235

FOUNDATIONS.

Excavation—earth	1012	cu. yds.	@ $ 8.64	$ 8,744
Excavation—rock	41	"	@ 10.70	439
Masonry (equivalent concrete)	674	"	@ 18.00	12,132
Pavement Replaced	409	sq. yds.	@ 3.25	1,329
Foundation Bolts	6.48	tons	@ 140.00	907
Back Fill	(Included in price of excavation)			
Waterproofing	220	sq. yds.	@ 8.50	1,870
Steel in Foundations	3.69	tons	@ 120.00	443
Cast Iron Washers	2.63	"	@ 90.00	237
Sidewalk Replaced	(Included in pavement replaced)			
Cleaning up and Spoil	(Included in price for excavation)			
Changes to Sub-Surface Structures:				
5% of above items				1,305
				$27,406
Base Castings & Fenders	62.03	T	@ 200.00	12,406
				$39,812

5236

STRUCTURE.

STEEL WEIGHTS		
Longitudinal Girders	864,040 lbs.	
Transverse Girders	217,320 "	
Columns	129,440 "	
Platform Beams & Supports	27,040 "	
Steel Reinforcing	21,400 "	
	1,239,240 lbs. = 629.62 tons	
Steel Structure	629.62 Tons at $120.00	$75,554
Drip Pans	2,464 S. F. at 0.50	1,232
Down Spouts	9 (included in price for drip pans)	
		$76,786

5237

TRACK

Rails	61.2 tons	at	$ 58.20	$ 3,562
Joints	170 pairs	at	1.06	180
Curving & drilling rail	(included in labor cost)			
Track bolts	1000	at	0.08	80
Spikes	7332	at	0.03	220
Tie plates, rail braces & chocks	823			315
Signals				2,638
Switches	4	at	$262.50	1,050
Bumper Blocks	3			1,900
Labor				
Laying rail tangent				1,177
Laying rail curves				461
Laying switches				644
				$12,227

5238

DECK

Ties	66,800 ft. B. M.	at	$85.00	5,848
Guard Timber	15,120 " "	"	85.00	1,285
Track Platforms	10,200 " "	"	85.00	867
Foot Walks	10,250 " "	"	85.00	871
Pipe Railing	2,050 L. Ft.	"	1.25	2,563
Bolts for ties and guard timber				1,218
Labor				3,103
				$15,755

ELECTRICAL DISTRIBUTION SYSTEM

Third Rail	29.5 ton	at	$58.20	$1,717
Third Rail Insulators	224	at	1.00	224
Third Rail Joints	67	at	3.20	214
Third Rail guard plank	2,000 ft. B. M.	at	58.00	116
Track Bonds	122	at	1.70	207
Third Rail inclines	14	at	10.00	140
Iron Conduit	260 L. F.	at	1.10	286
Cable Brackets	85	at	1.00	85
Cable	400 L. F.			235
Iron Wire	2,000 L. F.			10
Twisted Pair	3,000 L. F.	at	0.02	60
Lag Screws & Bolts				85
Telephone Cable	1,900 L. F.			651
Structure Bonds	60			69
Electric Light Outlets	75			1,010
3 Wire Lighting Cable	1,000	at	.26	260
Equalizer Terminals	30	at	.43	13
Protection blocks for Guard Plank	800	at	.10	80
				5,462
Labor				2,115
				$7,577

5240

STATION BUILDINGS, STATION PLATFORMS, STAIRWAYS, CANOPIES, PLATFORM RAILINGS, PLATFORM SHIELDS, ETC.

Station Platforms	6108 sq. ft.	@	$ 0.66	$ 4,031
Platform Railings	390 lin. ft.			1,683
Platform Shields	117 lin. ft.	@	12.00	1,404
Station Canopies	6108 sq. ft.	@	1.00	6,108
Stairways & Canopy				3,000
Sewer Connections	2	@	200.00	400
Park Avenue Station				7,186
Alarm House (Park Avenue)	3510 cu. ft.	@	0.70	2,457
Brakeman's House, 3rd Ave.	1980 cu. ft.	@	0.60	1,188
Switch Cabin, 3rd Ave.	296 cu. ft.	@	0.60	178
Circuit Breaker House (3rd Ave.)	900 cu. ft.	@	0.60	540
				$28,175

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Claimants' Exhibit "M-1"—Comparison of Estimates.

42nd STREET SPUR

COMPARISON OF ESTIMATES.

	Cost to Reproduce New		Depreciation		Depreciated Value	
	I. R. T.	City	I. R. T.	City	I. R. T.	City
Foundations	$27,406	$25,914	.....	.....	$27,406	$25,914
Base Castings	12,406	12,445	$1,426	.....	10,980	12,445
Steel	76,786	67,542	9,059	$30,888	67,727	36,654
Track	12,227	9,372	8,036	2,343	4,191	7,029
Deck	15,755	14,080	10,664	9,856	5,091	4,224
Electrical	7,577	7,318	2,652	1,098	4,925	6,220
Stations & buildings	28,175	28,336	9,258	11,334	18,917	17,002
5243	$180,332	$165,007	$41,095	$55,519	$139,237	$109,488
Contingencies	9,017	.....	2,055	.....	6,962	.....
	$189,349	$165,007	$43,150	$55,519	$146,199	$109,488
General Overhead	31,707	16,500	1,000	5,550	30,707	10,950
Total	$221,056	$181,507	$44,150	$61,069	$176,906	$120,438

Claimants' Exhibit "N"—Statement of Ticket Sales 1913-1919, 38th St. & 42nd St. at 6th Ave.

Effect Upon Traffic of 42nd Street Elevated Station at 6th Avenue of Opening New Station at 6th Avenue 38th Street Station Opened January 31, 1914.

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	38th St.	42nd St.	Total
1913	.....	4,070,225	4,070,225
1914	755,575	4,086,449	4,842,024
1915	2,043,960	3,738,225	5,782,185
1916	2,390,027	4,184,915	6,574,942
1917	2,799,390	4,819,635	7,619,025
1918	2,949,922	4,914,280	7,864,202
1919	3,154,314	6,292,026	9,446,340
1923	.....	.....	.....

The Broadway subway was opened December 5, 1918.
The 7th Avenue subway was opened June 17, 1917.

5245

Claimants' Exhibit "O"—Map of Routes of Interborough Rapid Transit Co.

(This map is printed at page 1926 of the record.)

Claimants' Exhibit "P"—Order Confirming Report of Commissioners re Woolsey, et al., in Condemnation Proceedings to Acquire Street Easement.

At a Special Term of the Supreme Court of the County of New York, held at the County Court House in the City of New York, on the 18th day of February, 1888,

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Present: Hon. Morgan J. O'Brien, Justice.

In the Matter of the Petition of the New York Elevated Railroad Company, relative to acquiring title to certain real estate in the City and County of New York. In re Woolsey, *et al.*

A petition having heretofore been presented to this court by the New York Elevated Railroad Company, in form and manner pursuant to the provisions of the act entitled "An Act to authorize the formation of Railroad Companies and to regulate the same," passed April 2nd, 1850, and the acts amendatory thereof and supplemental thereto, praying for the appointment of Commissioners of Appraisal for the purpose of acquiring title to certain real estate in the City and County of New York, said petition being verified the 15th day of May, 1888, and having been presented to a Special Term of this Court on the 7th and 8th days of June, 1888, and said petition setting forth that the said petitioner had constructed and finished an elevated steam railroad along, on and upon the

5247

5248 route set forth in said petition, including in said route a portion of East Forty-second street in the City of New York between Third and Lexington Avenues in said City pursuant to various statutes of the State of New York, referred to in the said petition, that James Renwick is the owner of the lots and premises described in Parcel two of the said petition and known as Nos. 148, 150, 152 and 154 East Forty-second street in the said City; that all the lots aforesaid are on the Southerly side of said East Forty-second street through which the
5249 aforesaid railroad of the petitioner has been constructed; that said James Renwick claims to have a right of property in the said lots and premises contained in and forming part of said East Forty-second street; the said property being certain easements or interests in the said street; that for the purpose of the incorporation of the said New York Elevated Railroad Company and of constructing and operating said railroad there is required so much of the real estate, privileges, easements or other interests in the said East Forty-second Street belonging to the said James Renwick appurtenant to the said lots and premises on said
5250 street as is or may be taken by the petitioner for its use as an elevated steam railway and during the time of its corporate existence as an elevated railway company, and so long as the aforesaid East Forty-second Street is used and maintained as a public street; the said lots being bounded and described as set forth at length in Parcel No. 2 of the said petition, as the same was amended by an order entered herein on the 12th June, 1888, and as hereafter in this order set forth, and that the said petitioner has not been able to acquire title to the said property and cannot agree with the owners of the same for the purchase or use thereof, all of which will more fully appear by

said petition; and said petition containing and setting forth the matters and things required by the statutes in such case made and provided, and a copy of such petition with a notice of the time and place when the same would be presented to the court having been duly served, as required by the statute, upon all persons whose interests herein were to be affected by the proceedings, to wit: upon the said James Renwick, and he having appeared before this court pursuant to notice, and the court having ordered and adjudged that the allegations in the said petition were proven by the evidence or were not disproved by the respondent, James Renwick, and that the petitioner was entitled to the relief asked for therein, and thereupon an order having been duly made by a Special Term of this Court appointing William N. Armstrong, Edward V. Loew and George W. Lyon, three disinterested and competent freeholders residing in the City and County of New York, as commissioners to ascertain and appraise the compensation to be made to the said James Renwick, as the owner of, or person interested in the property proposed to be taken, appropriated or interfered with by the petitioner for the purpose of its incorporation and for the purpose of constructing, maintaining and operating its said railway, as will more fully appear by the order entered herein, and filed in the office of the Clerk of the City and County of New York, on the 25th day of October, 1888; and the said Commissioners having met at the time and place mentioned in the aforesaid order of the 25th day of October, 1888, and having taken and subscribed respectively the oath prescribed by the Twelfth Article of the Constitution, and having first viewed the premises described in the said order amending the said petition, and having heard the proofs and allegations of the

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5254 parties, and having reduced the testimony taken by them to writing, and in all things having complied with the requisitions of the said act and the acts amendatory thereof and supplemental thereto, and having made and filed the report of their proceedings to this court by a paper writing signed by them and dated the 29th day of January, 1889, with the minutes of the testimony taken by them, wherein and whereby they report that they had ascertained the compensation which ought justly to be made by the petitioner, the said James Ren-
5255 wick for the real estate, easements and interests described in the said report to wit: to the said James Renwick as the value of so much of the easements of light, and of air and of access appurtenant to the said lots and premises as have been taken by the petitioner by the construction, maintenance and operation of its elevated railroad through Forty-second street, past the premises in question, the sum of $5,000. the said compensation being by such report assessed as upon the north track and structure and the cross tracks and structures and as upon the south structure without a
5256 track, all of which are shown upon the plan annexed to the said report and as the same existed at the time of signing such report, namely, January 29th, 1889.

Now on reading and considering all the proceedings heretofore had herein, and upon reading the report of the commissioners contained in the said paper writing filed herein on the 30th day of January, 1889, and upon reading and filing the notice of motion on behalf of the petitioner herein dated the 30th day of January, 1889, to confirm the report of the commissioners herein, and after hearing Messrs. Davies & Rapallo, attorneys for the petitioner, and William G. Peckham, Esq., of counsel for the said James Renwick, it is

Ordered, that the motion of the petitioner to confirm the report of the commissioners be and the same hereby is granted, and it is further

Ordered, that the report of the said commissioners contained in the said paper writing dated the 29th day of January, 1889, and filed on the 30th day of January, 1889, be and the same hereby is confirmed; and it is further

Ordered, that the petitioner pay James Renwick $5,000 and his costs and expenses and that upon the payment by the petitioner herein, to the said James Renwick, of the sum of $5,000 with interest thereon from the date hereof and which date it is agreed shall be considered as the date of the said award and assessment and upon the recording of a certified copy of this order in the clerk's office in the City of New York, as required by statute, the New York Elevated Railroad Company shall thereupon be entitled to enter upon take possession of and use for the purpose of its incorporation the real estate, property rights easements and interest referred to in the said order of the 25th day of October, 1888, appointing the said commissioners and in the said report of the said commissioners dated the 29th day of January, 1889, and filed on the 30th day of January, 1889, as aforesaid the same being described as follows namely: so much of the privileges easements or other interests in said East Forty-second street as are taken appropriated or interfered with by the construction, maintenance and operation of the elevated railroad of the petitioner herein belonging to or claimed by James Renwick and appurtenant to the lots and premises on the southerly line of East Forty-second street and bounded and described as follows:

Beginning at a point on the Southerly side of East Forty-second Street distant 141 feet and 8

5260 inches Westerly from the Southwesterly corner of 42nd Street and Third Avenue, running thence Westerly along the Southerly line of 42nd Street 83 feet and 4 inches running thence Southwardly and parallel with Third Avenue 98 feet and 9 inches; running thence Easterly and parallel with 42nd Street 83 feet and 4 inches; running thence Northwardly and parallel with Third Avenue 98 feet and 9 inches to the Southerly line of East 42nd Street to the point or place of beginning, being the same premises conveyed to James Ren-
5261 wick by deed of William Joyce and Elizabeth C. Joyce his wife recorded in the office of the Register of the City and County of New York in Liber 683 of Conveyances at page 193.

To Have and To Hold the same to the New York Elevated Railroad Company its successors or assigns for the purpose of maintaining and operating the elevated railroad described in the petition herein of said company, and as the same has been constructed as in said petition set forth, with rows of columns and superstructure carrying two tracks upon transverse girders, with the right to main-
5262 tain the piers and foundations now constructed and upon the said land, together the right to maintain the columns now constructed and existing in front of the said described premises; the estate hereby taken in the said land being limited to the right to use the same to maintain the said foundations, superstructures, columns and girders and operate a railroad thereon, as now constructed and operated in said East Forty-second street the said South structure thereof being without a track at the present time so long as the aforesaid street is used and maintained as a public street and upon performances of the conditions aforesaid the said James Renwick, his heirs and assigns, and all persons claiming under him, shall be divested

5263

and barred of all the said limited rights, estate and interests in the above described lots and premises so long as East Forty-second Street continues to be occupied and used as a public street; and it is further

Ordered that the said property owners' costs and the expenses of this proceeding be taxed by the clerk of this court on two days' notice after entry of this order by either party to the other. And it is further

Ordered, that the motion herein be granted and the said report is hereby ratified and confirmed.

5264

A Copy, Edward F. Reilly, Clerk.

We approve of the form of this order and waive notice of application for entry thereof both waiving right of appeal as to Parcel No. 2.

Dated New York February 18, 1889.

Peckham & Tyler, Attorneys for the said James Renwick.

[Filed February 20, 1889.]

5265

Claimants' Exhibit "Q"—Statutes and Documents Affecting Elevated Railways in the City of New York.

(This exhibit is the same as Claimants' Exhibit "C," extracts from which are printed at pages 1619 to 1642 of the record.)

Claimants' Exhibits "R" and "R-1" to "R-13"—14 Photographs.

(These photographs are printed at page 1928 of the record.)

5266 *Claimants' Exhibits.*

Claimants' Exhibits "S" and "S-1" to "S-16"—17 Photographs.

(These photographs are printed at page 1930 of the record.)

Claimants' Exhibit "T"—Deed of Easement, from Manhattan Railway Co. et al. to The 25 Broadway Corporation of 24 State St.

5267 Whereas Manhattan Railway Company in or about 1879 constructed as part of its elevated railway in Trinity Place, Borough of Manhattan, City of New York, a spur or branch thereof, extending from a connection with the northbound track of said elevated railway at bent No. 6 as shown on drawing No. 7172 attached hereto southerly upon the east side of Trinity Place and across Morris Street into the property then owned by it at the southeast corner of Morris and Greenwich Streets; and

5263 Whereas Manhattan Railway Company has conveyed the said property to the Twenty-Five Broadway Corporation and the said spur is no longer required for use in the operation of its railway and impairs the light, air and access appurtenant to said property upon which the Twenty-Five Broadway Corporation is about to construct a building; and

Whereas the said railway is leased to the Interborough Rapid Transit Company for a period of 999 years from November 1, 1875, by virtue of an indenture dated January 1, 1903; and

Whereas the said Manhattan and Interborough Companies have heretofore acquired from the

5269

owners of the property abutting upon said spur the street easements of light, air and access necessary to the unimpaired right to the maintenance of said spur;

Now, Therefore; this instrument made this 18th day of February, 1920, between Manhattan Railway Company, as owner and lessor and Interborough Rapid Transit Company as lessee, corporations organized and existing under the laws of the State of New York, having their principal offices at No. 165 Broadway, Borough of Manhattan, City of New York, parties of the first part and

5270

The Twenty-Five Broadway Corporation of 24 State Street, City of New York, Borough of Manhattan, a corporation duly organized and existing under the laws of the State of New York, party of the second part.

Witnesseth, that in consideration of the sum of $18,000. the receipt whereof is hereby acknowledged, the parties of the first part hereby grant and convey to the party of the second part, its successors and assigns, all their right, title and interest in and to the easements in said Trinity Place and Morris Street appurtenant to the property of the said Twenty-Five Broadway Corporation at the southeast corner of Morris and Greenwich Streets heretofore acquired by the said parties of the first part or either of them, necessary to the construction, maintenance and operation of that portion of the said two-track spur 54.57 feet in length shown upon the said drawing No. 7172, which extends south of bent No. 2 to the present termination of said spur upon the sidewalk on the southerly side of Morris Street, including the two columns now on said sidewalk in front of the property of the party of the second

5271

5272 part, the two tracks and all other portions of the said southerly span of said spur now existing above the surface of the ground.

And the said parties of the first part covenant with the party of the second part that the said covenantors and neither of them will reconstruct the said span or any part thereof without first repaying to the said party of the second part the said sum of $18,000. for the easement hereby conveyed.

5273 In Witness Whereof the said Manhattan Railway Company and Interborough Rapid Transit Company have caused these presents to be signed by their respective officers duly authorized thereto and caused their corporate seals to be hereto affixed this 18th day of February, 1920.

Manhattan Railway Company, By Alfred Skitt, President. (Seal) Attest: P. V. Tranque, Asst. Secretary.

Interborough Rapid Transit Company, By Frank Hedley, President. (Seal) Attest: H. M. Fisher, Secretary.

5274 State of New York, County of New York, ss.:

On this 27th day of February, in the year one thousand nine hundred and twenty (1920), before me personally came Alfred Skitt to me known, who, being by me duly sworn, did depose and say that he resides in Yonkers, New York; that he is the President of the Manhattan Railway Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of Directors of said corporation, and that he signed his name thereto by like order.

5275

Emil Pensel, Notary Public, Bronx Co. No. 5, New York County No. 19, King's County No. 31, Queens County No. 783, Bronx County Register No. 2111, New York County Register No. 1160, Kings County Register No. 1010. My Commission Expires March 30, 1921.

State of New York, County of New York, ss.:

On this 27th day of February, in the year one thousand nine hundred and twenty (1920), before me personally came Frank Hedley to me known, who, being by me duly sworn, did depose and say 5276
that he resides in Yonkers, New York; that he is the President of the Interborough Rapid Transit Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of Directors of said corporation, and that he signed his name thereto by like order.

Emil Pensel, Notary Public, Bronx Co. No. 5, New York County No. 19, King's County No. 31, Queens County No. 783, Bronx County Register No. 2111, New York County Register No. 1160, Kings 5277
County Register No. 1010. My Commission Expires March 30, 1921.

Claimants' Exhibit "U"—Diagram Showing Plottage of Property as of December 7, 1923.

(This diagram is printed at page 1932 of the record.)

5278 *Claimants' Exhibits.*

Claimants' Exhibit "W"—Pamphlet of Division of Franchises of Board of Estimate and Apportionment re Charges for Space in Street.

City of New York
Board of Estimate and Apportionment
Division of Franchises
Room 1307, Municipal Building
Centre and Chambers Streets

5279 Revocable Privileges

Information for Applicants seeking Consents for Pipes, Conduits, Platform Scales, Bridges, Railroad Tracks, Etc., to be placed under, over or upon the Streets of the City of New York

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All applications for consent to the construction, maintenance and operation of pipe lines, conduits, tunnels, bridges, platform scales, railroad tracks and similar structures under, over or upon the public streets in The City of New York should be made to the Board of Estimate and Apportion-
5280 ment.

Such consents when granted are solely for the purpose named in the consent and are for the sole use and benefit of the petitioner, who must own or lease the properties to be benefited, and cannot be sublet, assigned or transferred without special permission from the Board.

All such consents are revocable at the pleasure of the Board or may be terminated in case of failure on the part of the grantee to comply with any of the terms and conditions.

Applications should be made in the form of a

petition and addressed to the Board of Estimate and Apportionment, City of New York.

The petition must contain a definite description of the location of the proposed construction and the properties to be connected or benefited by the same, and should state specifically the uses for which the construction is intended. It should also state whether the properties are owned or leased by the petitioner, and must be signed by a duly authorized official of the corporation, a representative of the firm, or by the individual requesting the consent, who must also own or lease the property or properties to be benefited or connected by the construction. An original and twenty copies of the petition shall be furnished by the petitioner. 5282

A plan, eighteen inches by twenty-four inches, drawn upon tracing cloth, to a definite scale, shall accompany the petition. Upon this plan shall be shown the location of the property of the petitioner on both sides of the street and so marked. The plan shall also show the building lines and curb lines, railroad tracks, electrical conduits, sewers or similar substructures that may be in the street or streets which may be affected in any manner by the proposed construction. Information as to surface and subsurface structures may be obtained from the Department of Water Supply, Gas and Electricity, and from the Bureau of Substructures, Bureau of Highways, and from the Bureau of Sewers, connected with the Borough President's office in the borough in which the proposed construction is located. The location, character and dimensions of all such structures shall be accurately shown and indicated by figures. 5283

All details of existing structures shall be shown in black; all new construction within the lines of

5284 the streets shall be plainly shown in red, and sufficient distances and dimensions shall be given to locate the same definitely.

Sections, longitudinal and transverse, shall also be drawn upon the plan which will show the relative positions of the existing structures in the street and the new construction and the changes, if any, proposed to be made in the position of existing sewers, conduits or pipe lines, where such changes are caused by the construction of the new work.

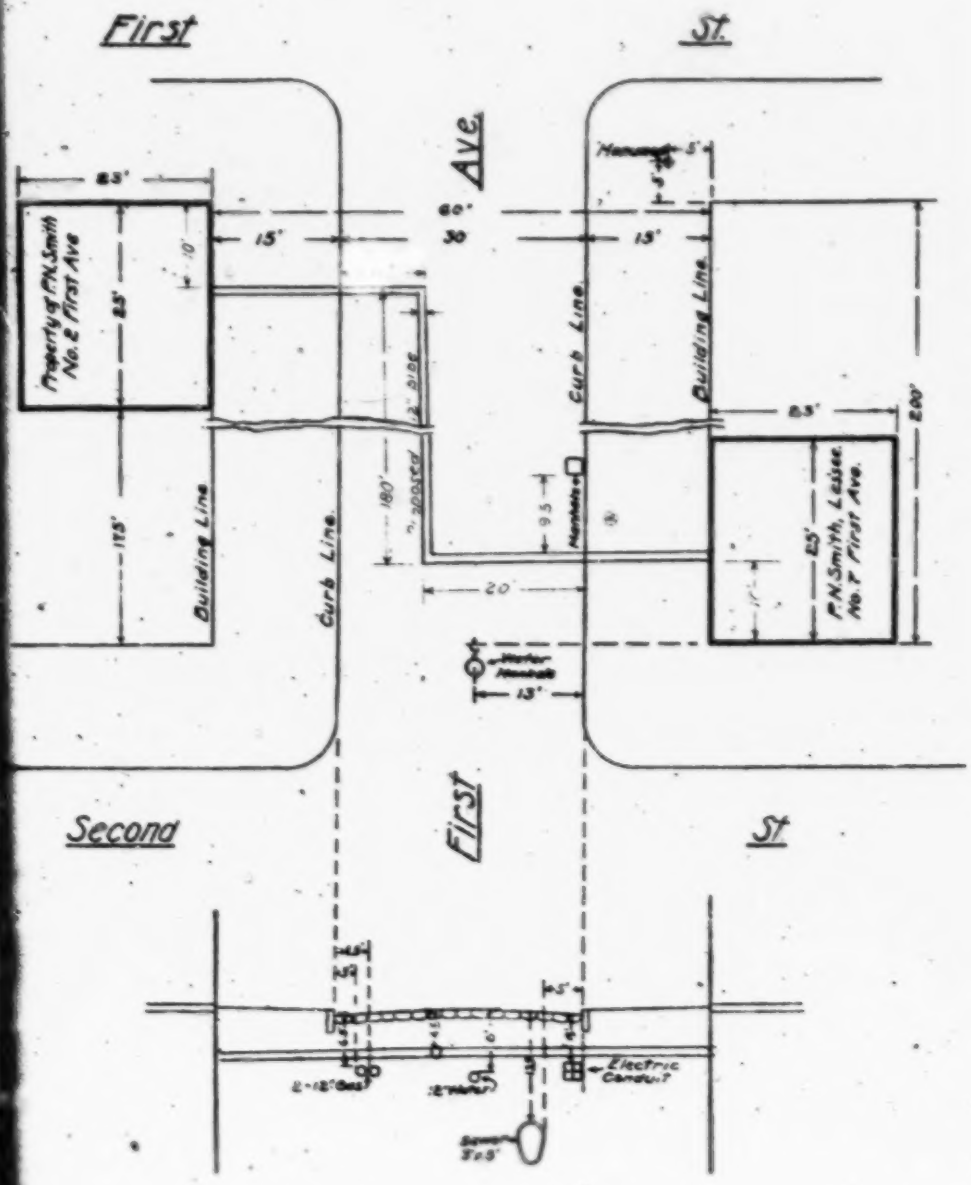
5285 The plan and sections shall also indicate in detail the method of construction and character of the materials to be used in the new work. All distances and dimensions shall be plainly indicated by figures, and any dimensions given in the application should agree with those marked upon the plan. The plan should bear the same signature as the petition.

There shall also be furnished for the use of the Board of Estimate and Apportionment, in addition to the tracing, 8 lithoprints on cloth and 16 on paper.

5286 All prints to be colored as the tracing.

A specimen plan and the proper title thereof are shown on the opposite page.

It is suggested that before the prints are made, the original tracing and a draft of the petition be submitted to the Division of Franchises for inspection.



Plan

showing location of

Proposed Pipe

to be constructed in

First Avenue

Borough of the Bronx

to accompany application dated Jan. 3, 1910, of

P. N. Smith,

to the

Board of Estimate and Apportionment

City of New York.

P. N. Smith
Applicant

Scale 1"= 10'

Note:- Proposed construction shown Red.





Cross section of Proposed Pipe.

2771 D

Specimen Plan Size of sheet 40 x 64

A rate of annual compensation for such privileges has been established by the Board of Estimate and Apportionment, which is shown by the following schedule:

For substructures and bridges.—Compensation to consist of a charge for the cubic space occupied, plus a percentage of the value of the area of the street occupied or covered.

The charge for the cubic space to be determined upon as follows:

	Per Linear Foot
Up to 1.4 square feet in cross-sectional area	$2.00
4 square feet in cross-sectional area	4.00
20 square feet in cross-sectional area	5.00
81 square feet in cross-sectional area	6.00
162 square feet in cross-sectional area	10.00
243 square feet in cross-sectional area	12.00

5288

Intermediate areas at a corresponding intermediate charge.

The above rates to apply for the first 100 feet in length of the structure. For greater lengths of a structure up to 1.4 square feet in cross-sectional area, the charge to be:

	Per Foot
For the next 50 feet	$1.90
For the next 50 feet	1.80
For the next 50 feet	1.70
For the next 50 feet	1.60
For the next 50 feet	1.50
For the next 50 feet	1.40
For the next 50 feet	1.30
For the next 75 feet	1.20
For the next 75 feet	1.10
For any greater length	1.00

5289

Larger structures to have a similar proportion-

5290 ate reduction in the charge for lengths greater than 100 feet.

To the amount determined as above must be added a percentage of the value of the area of the street occupied. Such percentage varies for the different type and use of structures as follows:

For pipes, conduits or tunnels used to contain pipes or electric conductors, 4 per cent.

For tunnels used to contain pipes or electric conductors and capable of being used as a passageway for employees or for transferring goods, 8

5291 per cent.

For tunnels used as public passageways or for the display of goods or for purposes other than above, 12 per cent."

For bridges, 8 to 12 per cent.

The minimum charge for all structures when the area of cross section is not more than 4 square feet to be $250 per annum in streets 25 feet or more in width.

The minimum charge for larger structures to be $500 per annum in streets 25 feet or more in width.

Structures to be used solely as fire escapes or structures petitioned for by public service corpora-

5292 tions to be used solely for the public convenience as a portion of a station or terminal, $100 per annum.

For surface railroad tracks.—For switching purposes only, no cars being allowed to stand on the track, 4 per cent. of the value of the area occupied, a width of 10 feet being estimated for a single track. For sidings on which cars are to stand to be loaded or unloaded, 8 per cent. of the value of the area occupied. The minimum charge for tracks, $500 per annum. When the track is to be used by a railroad corporation solely in connec-

tion with the operation of its railroad in order to afford access to a public passenger station or public freight yard, etc., $100 per annum.

For scales.—Eight per cent. of the value of the area of street occupied; minimum charge $250 per annum.

Consents for railroad tracks, as above, are at present governed by the case of Hatfield *v.* Straus (see 189 N. Y. Reports, 208).

Copies of similar applications and plans may be seen, and additional information will be given upon application, at the office of the Division of 5294
Franchises, Room 1307, Municipal Building, Centre and Chambers Streets.

Claimants' Exhibit "X"—Conveyance and Release, William and Margaret Volk to Manhattan Railway Co.

Whereas, William Volk acquired title to the premises hereinafter described by two several deeds, one dated October 24, 1923, and recorded in the office of the Register of the County of New York, on November 5, 1923, in Section 5, Liber 5295
3364 of Conveyances, page 354, and the other dated November 1, 1923, and recorded in the office of the Register of the County of New York on November 5, 1923, in Section 5 Liber 3370 of Conveyances, page 351, and has been ever since and now is seized and possessed of said premises in fee simple absolute; and

Whereas, said premises are bounded and described as follows: Beginning at the corner formed by the intersection of the southerly side of Forty-second Street, with the westerly side of Third Avenue and running thence westerly along the southerly side of Forty-second street one hun-

5296 dred feet; thence southerly parallel with Third Avenue ninety-eight feet and nine inches; thence easterly parallel with Forty-second street one hundred feet to the westerly side of Third Avenue and thence northerly along the westerly side of Third Avenue, ninety-eight feet and nine inches to the point or place of beginning, be the said several dimensions more or less; said premises being now known as No. 650 to 658 Third Avenue and 160 & 162 East Forty-second Street in the City and County of New York; and

5297 Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the streets adjacent thereto, as an open public streets and an interest or estate in the land forming the bed of the said streets; and

Whereas, adjacent to the lands and premises above described, the parties hereinafter named of the last part, and their lessee, the Interborough Rapid Transit Company, are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one

5298 of them; and

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to, or may be held by, the said parties of the first part, or which may hereafter arise to the said parties of the first part or their grantees, by reason of the construction, maintenance and operation of a rebuilt station and new stairway and their appurtenances in connection with the said railroad adjacent to the said premises.

Now, therefore, this instrument, made this 17th day of December, 1924, between William Volk and Margaret Volk, his wife, residing at No. 40 Columbia Terrace, Weehawken, New Jersey, parties of the first part, and Manhattan Railway Company, of No. 165 Broadway, City of New York, party of the last part, a corporation duly organized and existing under the laws of the State of New York, Witnesseth, that for and in consideration of the sum of Two thousand five hundred ($2500) dollars, the receipt whereof is hereby acknowledged, the parties of the first part hereby grant and convey to the party of the last part, its successors and assigns, all the right, title and interest of the said parties of the first part in said Third Avenue and East Forty-second Street, and the land forming the bed thereof, and the easements therein appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of a rebuilt station and new station stairway, and their appurtenances as erected at present, as the same are hereinafter more particularly described, in connection with and forming part of the elevated railroad, in said streets, and the parties of the first part hereby authorize and consent to the maintenance and use of the said rebuilt station and new stairway, and their appurtenances, in connection with and forming part of said elevated railroad in the said streets by the party of the last part, its successors, assigns and lessees forever, without further compensation or further liability for any damages that may hereafter be sustained by the said premises or by the owner or occupant thereof, or by any person in privity of estate with the parties of the first part, caused by said maintenance and use

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of said elevated railroad rebuilt station, stairway and their appurtenances, which are more particularly described as follows: viz: the said elevated railroad rebuilt station and stairway are described on Drawing No. 22941, entitled "Interborough Rapid Transit Co., Manhattan Railway Division, 3rd Ave. Line, proposed plan of station at 42nd St. account of removal of 42nd Street branch. Chief Engineer's office, N. Y. Aug. 22, 1923"

5303 And the said William Volk covenants with the party of the last part as follows:

First: That the said covenantor has good right to make this conveyance and release of the said property and has good right to convey the same.

Second: That the said property is free from encumbrances, except a certain mortgage given to secure the payment of the sum of $80,000, dated February 10, 1917, and recorded in Liber 3001 of Mortgages page 318, and outstanding leases.

In Witness Whereof, the parties of the first part have hereunto set their hands and seals the day
5304 and year first above written.

William Volk L. S.
Margaretha Volk L. S.

Sealed and delivered
in presence of
R. M. Baldwin.

U. S. I. R. S. $2.50

State of New York, County of New York, ss.:

On this seventeenth day of February, one thousand nine hundred and twenty-five (1925), before me personally came William Volk and Margaretha

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Volk to me known, and known to me to be the individuals described in, and who executed the foregoing instrument and acknowledged to me that they executed the same for the purpose therein mentioned.

R. M. Baldwin, Notary Public, N. Y. County No. 35; N. Y. Register No. 5100.

Claimants' Exhibit "Y"—Conveyance and Release, Rosewin Realty Co. to Manhattan Railway Co.

5306

Whereas, Abraham B. Wolpin and Benjamin Rosenthal, under a lease from William Volk, dated August 4, 1921 and recorded in the office of the Register of the County of New York on September 3rd, 1921, in Liber 3237 of Conveyances, page 468, acquired a leasehold interest for a term of twelve years and eight months from September 1st, 1921, in certain premises hereinafter described; and

Whereas, by an instrument in writing dated November 17th, 1922, and recorded in the office of the Register of the County of New York, on June 2nd, 1923, in Liber 3348 of Conveyances, page 500, the said Abraham B. Wolpin and Benjamin Rosenthal duly assign said lease and leasehold interest to Rosewin Realty Corporation; and

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Whereas, the said premises are bounded and described as follows: Beginning at the corner formed by the intersection of the southerly side of Forty-second Street with the westerly side of Third Avenue and running thence westerly on Forty-second Street one hundred feet; thence southerly parallel with Third Avenue fifty feet; thence easterly parallel with Forty-second Street one hundred feet to Third Avenue and thence

5308 northerly along Third Avenue fifty feet to the point or place of beginning, be the said dimensions more or less; said premises being known as Nos. 654-658 Third Avenue and 160 and 162 East Forty-second Street, in the City and County of New York; and

Whereas, appurtenant to said premises there are claimed to be certain rights or easements to the enjoyment of the street adjacent thereto, as an open public street and an interest or estate in the land forming the bed of the said street; and

5309 Whereas, adjacent to the lands and premises above described, the parties hereinafter named of the last part, and their lessee, the Interborough Rapid Transit Company, are maintaining and operating an elevated railroad constructed by them, or one of them, or the predecessor of one of them; and

Whereas, the parties hereto desire and intend, for the consideration hereinafter expressed, to settle and adjust all claims and causes of action against said companies, or either of them, which may have arisen to the said party of the first part,

5310 or which may hereafter arise to the said party of the first part or its grantees, by reason of the construction, maintenance and operation of a rebuilt station and new stairway and their appurtenances in connection with the said railroad adjacent to the said premises during the term of said lease and any renewals thereof.

Now, therefore, this instrument, made this 5th day of December, 1924, between Rosewin Realty Corporation, a corporation duly created and existing under the laws of the State of New York and having its principal place of business at No. 162 East Forty-second Street, in the Borough of

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Manhattan, in the City of New York, party of the first part, and Manhattan Railway Company, of No. 165 Broadway, City of New York, party of the last part, a corporation duly organized and existing under the laws of the State of New York, Witnesseth, that for and in consideration of the sum of Five Hundred ($500.) dollars, the receipt whereof is hereby acknowledged, the party of the first part for the sole purpose hereinafter set forth hereby grants and conveys to the party of the last part, its successors and assigns, all the right, title and interest of the said party of the first part, and 5312
all which it may or will acquire under the lease aforesaid, in said Third Avenue and East Forty-second Street, and the land forming the bed thereof, and the easements therein appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of a rebuilt station and new station stairway as at present constructed, and their appurtenances, as the same are hereinafter more particularly described, in connection with and forming part of the elevated railroad, in said streets, and the party of the first part hereby authorizes and consents to the 5313
maintenance and use of the said rebuilt station and new stairway, and their appurtenances, in connection with and forming part of said elevated railroad in the said streets by the party of the last part, its successors, assigns and lessees forever, without further compensation or further liability for any damages that may hereafter be sustained by the said leasehold premises or by the owner or occupant thereof, or by any person in privity of estate with the party of the first part, caused by said maintenance and use of said elevated railroad rebuilt station stairway and their appurte-

5314 nances, which are more particularly described as follows, viz: The said elevated railroad rebuilt station and stairway are described on Drawing No. 22941, entitled "Interborough Rapid Transit Co., Manhattan Railway Division, 3rd Ave. Line, proposed plan of station at 42nd St. account of removal of 42nd St. branch, Chief Engineer's office, N. Y. Aug. 22, 1923."

This instrument is to continue in force during the term of the aforesaid lease and any renewals thereof and of any lease or leases of said premises
5315 that may be substituted for said lease during its term or any part thereof.

And the said party of the first part covenants with the party of the last part as follows:

First: That the said covenantor has good right to make this conveyance and release of the said leasehold property and has good right to convey the same.

Second: That the said leasehold property is free from encumbrances.

In Witness Whereof the said Rosewin Realty Corporation has caused these presents to be signed
5316 by its President and caused its corporate seal to be affixed hereto this day of December, 1924.

Rosewin Realty Corporation, by Frederick L. Klein, President.

Attest: B. Rosenthal, Secretary.

U. S. I. R. S. 50c.

State of New York, County of New York, ss.:

On this 5th day of January, in the year one thousand nine hundred and twenty five (1925), before me personally came B. Rosenthal to me

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known, who, being by me duly sworn, did depose and say that he resides in New York City that he is the Secy and Treas of the Rosewin Realty Corporation the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of Directors of said corporation, and that he signed his name thereto by like order

John F. Doyle Notary Public N. Y. County No. 205 N. Y. Register No. 5187

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State of New York, County of New York, ss.:

On this 5th day of January, in the year one thousand nine hundred and twenty five (1925), before me personally came Frederick L. Klein to me known, who, being by me duly sworn, did depose and say that he resides in New York City that he is the President of the Rosewin Realty Corporation the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of Directors of said corporation, and that he signed his name thereto by like order

5319

Frederick L. Klein

John F. Doyle Notary Public N. Y. County No. 205 N. Y. Register No. 5187

State of New York, County of New York, ss.:

On this 5th day of January, in the year one thousand nine hundred and twenty five (1925),

5320 before me personally came Frederick L. Klein to me known, who, being by me duly sworn, did depose and say that he resides in City of New York; that he is the President of the Rosewin Realty Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of Directors of the said corporation, and that he signed his name thereto by like order.

5321 And the said Frederick L. Klein further said that he is acquainted with B. Rosenthal, and knows him to be the Secy & Treas of said corporation; that the signature of the said B. Rosenthal subscribed to the said instrument is the genuine handwriting of said B. Rosenthal, and was thereto subscribed by the like order of the said board of Directors, and in the presence of him the said Frederick L. Klein.

John F. Doyle Notary Public N. Y. County No. 205 N. Y. Register No. 5187

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Claimants' Exhibit "Y-1"—Extracts from the Minutes of the Proceedings Before the Public Service Commission on the "Application of Board of Estimate and Apportionment Relative to East 42nd Street Spur" (Case No. 2582).

(Of Claimants' Exhibit Y-1, pp. 1775 to 1777, 1784 to 1793 inc. of the record, being the testimony of Forest, of Bernstein, of Doino, of Schaeffer, of O'Connor and of Ryan, are printed at the request of the claimants and pages 1778 to 1783, 1793 to 1869 inc., of the record, being the testimony of McCue, of Brown, of Knox, of Meikleham, of Bernheim, of Bauer and of Schaeffer, are printed at the equest of the City.)

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State of New York, Public Service Commission, 1st District.

In the Matter of the proceeding to determine whether existing tracks, structure, station and appurtenances of the Manhattan Railway Company on 42nd Street in the City of New York are necessary and convenient for the public service or whether even if necessary and convenient such tracks, structure, station and appurtenances constitute an impediment or obstruction to the public use of the street.

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New York City, March 21, 1921.

Met pursuant to notice in the Hearing Room, Public Service Commission, 1st District No. 49 Lafayette Street, New York City, at 10:30 o'clock a. m.

Before: Hon. Alfred M. Barrett, Commissioner, Public Service Commission, 1st District, And Hon.

5326 *Claimants' Exhibits.*

Charles V. Halley, Jr., Deputy Commissioner, Public Service Commission, 1st District.

Appearances: Terence Farley, Esq., Counsel for the Public Service Commission, 1st District, And H. M. Chamberlain, Esq., Assistant Counsel. John P. O'Brien, Esq., Corporation Counsel for The City of New York, by Mr. Devery, Assistant Corporation Counsel. J. O. Nichols, Esq., Counsel for the Manhattan Railway Company. Arthur G. Peacock, Esq., Counsel for the Interborough Rapid Transit Company. E. W. Forest, Esq., Representing the 42nd Street Property Owners & Merchants Association. Mr. Hobbs, Representing a minority of the shareholders of the Manhattan Railway Company and the Interborough Rapid Transit Company.

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E. W. FOREST, called as a witness in behalf of the applicant, being first duly sworn, testified as follows:

Direct examination by Mr. Devery:

5328 Q. Mr. Forest, you are the secretary of the 42nd Street Property Owners & Merchants Association? A. I am.

Q. And as such secretary did you procure to be signed a certain petition relative to the removal of the elevated spur on 42nd Street? A. I did.

Q. Have you that petition in your hands? A. Yes; this is a copy.

Q. Will you kindly read that. A. Yes. This is a petition circulated the latter part of September, addressed to the Honorable John F. Hylan, Mayor and Chairman of the Board of Estimate and Apportionment, City Hall, New York City, and reading as follows:

"The persons who sign this petition either reside or are engaged in business so located as to be affected by the existence of the elevated spur on 42nd Street between Third and Park Avenues. They desire hereby to emphasize their interest and determination that the spur shall be removed. It constitutes an obstruction to traffic, a hindrance to the proper development of 42nd Street east of Lexington Avenue, a disfigurement to the monumental and important buildings now erected or already projected for the Pershing Square District, and an encumbrance to the property on 42nd Street now owned by the City. With the 3rd Avenue elevated road and the East Side subway in operation, this spur is no longer a convenience to the travelling public and its continued operation is a burden to the operating company, and a positive menace to safety of the travelling public as stated by Police Commissioner Enright. These are among the reasons that emphasize the necessity for action that will result in its removal. Its elimination will relieve the street and allow the proper normal development to the East River on 42nd Street which has become the permanent great cross thoroughfare of Manhattan.

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"A special law has been enacted laying down a procedure whereby this unsightly structure may be removed. It was drafted by the then Corporation Counsel, Honorable William P. Burr, to meet the deficiencies of the prior act of 1917.

"If a reasonable agreement cannot be reached promptly with the Interborough Rapid Transit Company, the operator, and the Manhattan Railway Company, the owner, you are urged to secure prompt condemnation and removal of the structure."

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HON. MARTIN G. McCUE, called as a witness in behalf of the applicant, being first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. Mr. McCue, you are the Senator whose district comprises 42nd Street between 3rd and Park Avenue? A. Yes, sir.

Q. You are familiar with the spur there at 42nd Street? A. Yes, sir.

Q. Will you tell the Commission what you idea
5333 is with regard to the removal of that spur? A. My idea in regard to the removal of that spur prompted me to introduce the bill under the provisions of which this hearing is held. My idea of the thing is that it is a nuisance to the travelling public, a nuisance to the property owners and of no use to the 3rd Avenue Elevated Railway Company, especially now that it looks like a fairly good bet that the traction bill is going to be passed by the Assembly tomorrow. There is no good reason why the 3rd Avenue Elevated wants that spur any more, and the only contention they have made was in case the Interborough Rapid Transit went
5334 into bankruptcy and the 3rd Avenue Company's lines would be returned to them, that it would not be a feeder from the 3rd Avenue to the Grand Central.

Commissioner Barrett: And reduce the car mileage which the company is complaining so much about.

Senator McCue: And also reduce the operating costs.

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Claimants' Exhibits.

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STEWART BROWN, called as a witness in behalf of the applicant, being first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. What is your name? A. Stewart Brown.

Q. Who do you represent, Mr. Brown? A. The United Realty Owners Association.

Q. How many of the property owners on 42nd Street belong to your association? A. A large number of department stores and hotels.

Q. What is your position in that association? 5336
A. President.

Q. And as President you have a right to voice their sentiments? A. I think I am voicing the sentiments of every real estate owner in the City of New York, to the extent that they will all receive a benefit if this spur is taken down.

Q. Well, what are your sentiments with regard to this matter? A. I am familiar with that section personally. I am repeatedly up in the subway to 42nd Street and repeatedly take the 3rd Avenue and go downtown or uptown. I would never dream for a moment of taking that spur but take the 3rd Avenue elevated. They say that 2,000 peo- 5337
ple use that spur during the day but I should doubt that, from the few people I see. That spur is closed early in the evening and it is not used to that extent I am sure.

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5338 *Claimants' Exhibits.*

WILLIAM E. KNOX, called as a witness in behalf of the applicant, having been first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. What is your name? A. William E. Knox.

Q. Mr. Knox, you are President of the Bowery Savings Bank? A. Vice-President.

Q. You are putting up a new bank building at the corner of 42nd Street and Park Avenue, on the southeast corner? A. We are having plans drawn
5339 for a new building.

Q. It is your purpose to move your bank from the Bowery? A. No, it is our purpose to run both.

Q. Now, will you tell the Commission what you think about this spur. A. Yes; we think that the spur is a detriment to the whole street. We think that, as well as being a detriment to the looks of the street and an eye-sore, but for our depositors who will go there when the branch is opened, the street will be positively dangerous. We have thousands of accounts—old women and old men and children—everybody. We also think that the spur on the street will affect rental values of any stores
5340 that we may put in our building, which it is a possibility we may do. It affects the whole value of the property. We think the property would be worth more with the spur down. If there were no spur there I do not think anybody would advocate building a spur for the accommodation of the few people that use it.

By Commissioner Barrett:

Q. You realize that if the spur was removed that some of the damages would go upon the property you build on. A. We realize that, and if a fair

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damage is assessed we would not object. We would not like to be held up for an excessive damage, but if any actual damage was done I do not think there would be any disposition on the part of the company to object.

By Mr. Devery:

Q. How many depositors have you? A. About 160,000.

Q. How many do you expect at your new branch? A. Over 70 per cent. will go to 42nd Street. I use that spur. I live out of town and

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come into the Grand Central station and use the spur I think as much as any other one man in the City. If I do not happen to see the train up there I walk over to 3rd Avenue and make just as good time.

By Commissioner Barrett:

Q. You think that if the spur were removed the rental values on Third Avenue would increase? A. I do not believe so. I cannot conceive of anybody using the 3rd Avenue Railroad because that spur was there that would not use the elevated railroad without the spur.

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MR. MEIKLEHAM, appearing as a witness in behalf of the application, having been first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. What is your name? A. —. —. Meikleham.

Q. Your building is located on the corner of 42nd Street and Lexington Avenue? A. Yes.

Q. What is the assessed valuation of your property, do you know? A. The assessed valuation of

5344 the property is— You mean the land and the buildings?

Q. The land and buildings? A. $1,450,000, as I remember.

Q. You are aware that, as the owner of this property, you would be assessed for the cost of the removal of this spur? A. I believe so.

Q. And you are perfectly willing to pay your fair share of the cost? A. To a reasonable amount.

Q. Will you tell the Commission what your idea
5345 is of the value of the spur to the property and to the public? A. Well, we believe that the spur is obsolete, it is useless; it is a detriment to the street. My personal observation—my office is right facing the spur, and I see very little travel on it. I have never taken a count of it, but there seems to be very little travel and I feel that, since the subway has been built, the East Side subway, that what little use that spur might be to the 3d Avenue elevated is a good deal more than counter-balanced by the general value and use that that section could be put to. I think it would mean a development in that section which is now kept back by
5346 reason of a nuisance of that sort. The street is all blocked up and we seldom use it with our vans; we go down 41st Street.

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MATTHEW BERNHEIM, called as a witness in behalf of the applicant, having been first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. What is your name? A. Matthew Bernheim.

Q. You are the owner of 156-8, 42nd Street? A. I am.

Q. How large a building is that? A. It is a three story building, 41.8 by 90. 5347

Q. What is the assessed valuation? A. $105,000.

Q. Where is that located—between Lexington and Park? A. Between Lexington and Third.

Q. Lexington and 3d; on the south side? A. The south side of the street. It is the original subway station of the Queens Borough subway.

Q. Will you tell the Commission what you think about this spur? A. I think the spur is a detriment to the property valuation. It is a nuisance and it interferes with traffic. I am also the tenant of 5348
138-140 East 42nd Street, where a large number of people patronize the store. My personal opinion is —I very frequently go on 3rd Avenue and I do not think taking the spur might save me a few steps but it would take longer. It is very much easier to walk across and from personal observation those who are using it, both my employees and customers, I find that they are not—I haven't heard of anyone who is in favor of it. It may have had some use some years ago but not since the subway is in existence, and it is certainly a detriment. The columns interfere with the traffic. When you 5349
go through there—I sometimes take a cab and the cabman has to slow up and wait for other traffic to pass, and it interferes. So I can see no reason why it should continue there. The few passengers that take it would take the 3d Avenue L just as well without it.

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MR. BERNSTEIN, appearing as a witness in behalf of the applicant, having been first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. Mr. Bernstein, you are connected with the Fifth Avenue Association? A. I am director of research of the 5th Avenue Association.

Q. The 5th Avenue Association represents property owners in this neighborhood? A. Well, my position in connection with this spur is that the
5351 board of directors of the association directed me to make an investigation of the traffic conditions, and I completed such an investigation last week. For two weeks we took observations and upon the strength of that observation I reported to the board of directors that the structural pillars interfere very strenuously with the traffic at 42nd Street. The pillars slow down the traffic on 42nd Street and cause great loss of time to everybody who goes through there, who has to travel himself or send his goods from the East Side to the West Side of 42nd Street. Upon that report the
5352 board of directors unanimously approved a request on the Board of Estimate and Apportionment to take the necessary steps to remove the spur.

Q. When was that resolution adopted? A. In 1920 on the 14th of November.

Q. How many members have you in your association? A. 1350.

Q. Of property owners on 5th Avenue? A. Not all; a large part of them. I could not tell you the exact number.

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By Commissioner Barrett:

Q. Why should the 5th Avenue Association be interested in the slowing up of traffic on 42nd Street? A. Because the traffic on 5th Avenue is very congested and the value of 5th Avenue as a business street depends greatly upon the facilities with which traffic can be handled. As long as the 5th Avenue traffic is held up by the west and east bound traffic the north and southbound traffic cannot move freely, and therefore any improvement in the east and westbound traffic improves the condition on 5th Avenue.

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By Commissioner Halley:

Q. It will increase the traffic on 42nd Street if you clear those columns away? A. But you increase the passage of the street.

By Mr. Devery:

Q. You think 41st Street is bearing more than its share of the traffic now? A. No, not under my investigation. You must remember there is no crosstown traffic on 43rd or 44th. It is on 45th Street, but there is absolutely no crosstown traffic between 42nd and 45th. On 42nd we will have to carry a great deal of traffic.

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Q. Where does the traffic go now that should go to 42nd? A. 45th. You cannot pass today there with two trucks; two trucks can hardly pass each other without danger.

Q. You say you made an investigation of two weeks? A. Yes.

Q. A personal investigation? A. Personal investigation.

Q. You took counts? A. Took counts and time. I have found that, for instance, the speed of the

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general traffic compared with the general traffic in Broadway and Madison, that the speed east of Madison Avenue, it takes about twice as long for a vehicle to get from Madison.

By Commissioner Halley:

Q. That is not the only factor, however? A. No, but it is one factor. You haven't the space and you have to move slowly..

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5357 ANTHONY DOINO, called as a witness in behalf of the applicant, having been first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. What is your name? A. Anthony Doino.

Q. Mr. Doino, you are employed by the National Ice & Coal Company? A. Yes, sir.

Q. In what capacity? A. Driver.

Q. You are also foreman? A. Yes.

Q. You drive a truck yourself through 42nd Street very often? A. At times—most of the time.

5358 Q. What has been your experience in driving a truck, as to these elevated pillars? A. It is very dangerous. When you are turning a corner you generally hit the posts and you cannot back up, and when you get alongside a car you cannot pull out and it is dangerous to the passengers getting on the car.

Q. That causes you frequent delay? A. It is a cause of delay and it is dangerous to passengers..

Q. How many wagons do you have? A. We have different types. We have considerable.

Q. How many have you got in this district? A. 17.

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Q. That are in use every day? A. Every day.

Q. Have you had any accidents there through colliding with the elevated pillars? A. I have hit them considerable times by bumping up against them and causing the ice to fall off, which is dangerous.

Q. If an automobile is parked alongside the curb you have to take to the car tracks? A. Take to the car tracks?

Q. How long have you been driving a truck? A. Three years with this company.

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AMOS SCHAEFFER, called as a witness in behalf of the applicant, having been first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. Will you state your connection with the City? A. I am consulting engineer to the President of the Borough of Manhattan.

Q. Now, after the enactment of this act of 1919, what efforts did you make to arrive at an agreement with the company as to the removal of this spur? You were authorized by the Borough President to negotiate with the company? A. Yes.

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Q. What efforts did you make to negotiate with them? What steps did you take? Did you write to them and have conferences with them? A. The Board of Estimate and Apportionment, in December, 1919, authorized the Borough President under the act of 1919 to negotiate with the Manhattan Railway Company for reaching an agreement to remove the elevated structure. Perhaps the earlier history ought to be related in order to get the full reasons for the legislation of 1919.

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The act of 1917—I am a little bit hazy about it, but it is something to this effect it authorized the City and the Manhattan Railway Company to reach an agreement for the removal of the elevated structure. Under that agreement the Borough President wrote a letter to the Manhattan Railway Company in regard to the matter. The late President Shonts of the Interborough replied that he had taken this matter up with the Manhattan Railway Company and that under no circumstances would it consider the removal of the spur.

5363 *By Commissioner Halley:*

Q. That was when? A. That was in 1918 that is my recollection. That is, under the first act of 1917 that was done. There was nothing in that act enabling the City to continue the negotiation any further; that is, the City had no means of compelling any action, and the thing simply dropped there. Until the City received a reply it could not do anything further, and for that reason the act of 1919 was passed by the legislature to enable the City to continue these negotiations for some other method of removing the structure, pro-

5364 viding no agreement could be reached between the City and the railroad company. As already stated, the act provided that if no certificate had been issued by the 1st of October, and if no agreement could be reached, then the Board of Estimate & Apportionment by resolution should ask the Public Service Commission to hold hearings and to issue a certificate as to whether the structure were necessary, and even if it were necessary whether it would constitute an impediment to traffic. Then, acting under the resolution of the Board of Estimate and Apportionment of De-

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cember, 1920, the Borough President wrote the railway company for the purpose of taking up these negotiations for the purpose of reaching an agreement for the removal of the structure. A number of meetings were held and the company was asked to submit a figure for which it would remove the structure. The company was reluctant to do this and in fact never gave any figure for which it would remove the structure. It, however, submitted certain figures of original cost certain values of the easements which it had obtained, some of which it had paid for and some of which it had not paid for, that is light, air and access and the only figures we could get as to the value of the structure was what it would cost to reproduce the structure. The Borough President believed that, for the purpose of removing the structure, the value of the structure as it stands should be considered, and at any rate the Borough President felt that, so far as the figures should or could be determined which the Manhattan Railway was willing to accept for the removal of the structure were entirely too high for the City to consider; and the Borough President so reported to the Board of Estimate and Apportionment.

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New York City, March 23, 1921.

Met pursuant to adjournment in the Hearing Room, Public Service Commission, 1st District, No. 49 Lafayette Street, New York City, at 2:30 o'clock p. m.

Before Hon. Alfred M. Barrett, Commissioner, Public Service Commission, 1st District.

Appearances—Terence Farley, Esq., Counsel for the Public Service Commission, 1st District, and

5368 *Claimants' Exhibits.*

H. M. Chamberlain, Esq., Assistant Counsel. John P. O'Brien, Esq., Corporation Counsel for The City of New York, by Mr. Devery, Assistant Corporation Counsel. J. O. Nichols, Esq., Counsel for the Manhattan Railway Company; Arthur G. Peacock, Esq., Counsel for the Interborough Rapid Transit Company. E. W. Forrest, Esq., Secretary of the 42nd Street Property Owners & Merchants Association.

JOHN W. O'CONNOR, appearing as a witness in behalf of the applicant, having been first duly
5369 sworn, testified as follows:

Direct examination by Mr. Devery:

Q. What is your name? A. John W. O'Connor.

Q. What is your position, Mr. O'Connor? A. Captain, Traffic Squad, New York Police Department.

Q. Mr. O'Connor, you are now acting head of the Traffic Division of the Police Department? A. I am.

Q. You are familiar with the traffic situation at 42nd Street, between Third Avenue and Grand
5370 Central Station? A. I am.

Q. Are you familiar with the elevated spur there? A. Yes.

Q. Do you know how it is constructed? A. Yes.

Q. That there are pillars down in the street? A. I do.

Q. Will you tell the Commission your opinion as to the nature and extent of these pillars—the nature and extent that they form an obstruction to the surface traffic in that street? A. Well, I believe that the traffic within that vicinity is becoming very acute, and that the elevated pillars form a serious obstruction to the traffic in those two blocks.

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JAMES E. L. RYAN, appearing as a witness in behalf of the applicant, having been first duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. What is your name? A. James E. L. Ryan.

Q. Mr. Ryan, what is your connection with the City? A. Engineer in charge of field forces.

Q. Of the Borough President's Office? A. Yes, sir.

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Q. By referring to this map, Mr. Ryan, will you tell me the width of 42nd Street? A. The width of 42nd Street is 59.9 feet.

Q. I am speaking now of the roadway? A. 42nd Street is 100 foot street, and the distance of the roadway, between curbs, is 59.9 feet, from Third Avenue over to a distance about 100 feet east of the east building line of Park Avenue, where it is decreased to 57.4 feet, due to a break in the alignment at the north curb.

Q. How many rows of elevated columns are there? A. Two rows of elevated columns in the street.

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Q. What is the location of the columns in relation to the curb lines? A. On both sides of the street the location of the columns, from base of column to curb is 7.1 feet.

Q. What is the distance between the pillars? A. 40½ feet.

Q. That is the entire distance? A. Inside to inside.

Q. The entire distance from curb at Park Avenue? A. That is at Lexington Avenue.

Q. Now, is the space between the pillars occupied by street railway tracks? A. There is a

double line of tracks, railway tracks between the "L" columns.

Q. How much was that distance, did you say, between the pillars? A. 40.5.

Q. How much of this space is taken up by the railway tracks from the outside rail to the outside rail? A. 14.83 feet.

Q. Allowing for the overhang of a car, what is the effective roadway width? A. The effective roadway width is 11 feet on the north side and it varies on the south side from 9.5 at Third Ave-
5375 nue to 11.2 west of Lexington Avenue.

Q. Is there room for more than one lane of traffic between the trolley car and the "L" pillars? A. There is not.

Q. What is the effective roadway width between the elevated pillars and the curb? A. Between the pillar and the curb it is a distance of 7.1.

Q. So there is no room for more than one lane of traffic there? A. There is not room for more than one lane of traffic there at all. In fact, big cars could not go in there.

Q. You mean, when there is a car parked at
5376 the curb there is no room for another vehicle? A. There is not.

Q. How many lanes of traffic do you ordinarily have on a hundred foot street? A. Three lanes of traffic.

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Q. Did you take a count of the vehicles at 42nd Street? A. Yes, sir.

Q. When did you take that count? A. On March 11, 1921 and March 19, 1921.

Q. At what points did you take it on 42nd? A. We took that between Third and Lexington Avenues of vehicles going in each direction, and

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between Lexington and Park Avenues of vehicles going in both directions.

Q. Have you tabulated that count? A. Yes, sir.

Q. Is this the tabulation (handing paper to witness)? A. It is.

Mr. Devery: I offer that in evidence.

(Paper referred to was received in evidence and marked Exhibit No. 6 of this date.)

Q. Between what hours did you take this count? A. Between the hours of 8 a. m. and 7 p. m.

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Q. You observed the traffic at how many points? A. At one point between Third Avenue and Lexington Avenue and one point between Lexington and Park Avenues.

Q. To the point between Lexington and Park Avenues? A. Yes, sir.

Q. What was the total number of vehicles passing? A. The total number of vehicles passing between those hours was 3,578.

Q. What was the average number per hour? A. The average number per hour was 325.

Q. What was the maximum in that period? A. The maximum in that period was 348 between 4 and 5 p. m.

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JOHN BAUER, a witness appearing in behalf of the Applicant, having been duly sworn, testified as follows:

Direct examination by Mr. Devery:

Q. Mr. Bauer, you are an expert statistician and accountant in the office of the Corporation Counsel? A. Appointed by the Corporation Counsel.

Q. Have you made an investigation at the request of the Corporation Counsel to ascertain the

5380 number of tickets sold at Grand Central shuttle station and on the elevated system at 42nd Street? A. Yes.

Q. How were those figures computed? A. They were obtained from the records of the Interborough Rapid Transit Company and checked off in part against the reports of the Interborough Rapid Transit Company to the Public Service Commission of the 1st District.

Q. For how many years did you get that? A. I have presented the figures here annually between
5381 the years 1900 and 1920, inclusive, and then, for the Grand Central station, exclusively, by five year periods, back to 1883.

Q. Is this the tabulation of those figures? A. Yes.

Mr. Devery: I offer that in evidence.

(The paper refered to was received in evidence and marked Exhibit No. 10 of this date.)

Q. Will you give a brief history, showing the change in the traffic on the 42nd Street spur, since 1880? A. In 1880 the number of tickets sold at
5382 the Grand Central station amounted to 645,895. There is then an increase to 2,052,317, in 1890. Then there is a decrease to 1,413,052 in 1900, reflecting, I suppose, the effect of the competition of the electrification of the surface lines with the elevated. Then, there is a rapid increase to 2,273,486 in 1904. That was the peak point reached during the entire history of the shuttle. At this time the subway was opened, and then there was a rapid decline in traffic and the total number of sales in 1906 was only 996,325. After that there was again a gradual increase, reaching a peak of 1,862,464 in 1918. Then, with the opening of the H-system,

there was again a decrease to 1,525,427 in the year 1920. This survey shows that the traffic fell off markedly with every introduction of new facilities handling the traffic—affecting the traffic—in the region of the Grand Central station; and chiefly after the introduction of the new facilities there was a gradual increase and accumulation of traffic afterwards. 5383

Q. How do the sales of tickets of the shuttle station compare with the sales of tickets on the Third Avenue line, as a whole?

Mr. Farley: What do you mean,—42nd and Third Avenue? 5384

Mr. Devery: No, I mean the Third Avenue line as a whole.

A. I made percentage comparisons between several years. I find that in 1900 and 1904, just before the original subway was opened, the Grand Central sales of the shuttle were approximately two per cent. of the Third Avenue line sales. Then, in 1920, this percentage—the Grand Central station traffic amounted to only one per cent. of the total Third Avenue, indicating that there was a relative decline of the shuttle traffic compared to the total traffic of the Third Avenue line. 5385

Q. What did you find the total sale of tickets were on the whole system in 1900? A. 184,-164,-110.

Q. I am speaking now of the Third Avenue line? A. Oh, for the Third Avenue line, the total sales were, 73,518,053, in 1900.

Q. They show a gradual increase, do they not, up to the year 1920? A. Well, there was a gradual increase until 1918. Then, there was a reduction the next year, and an increase in 1920 again. In 1920 the number was 145,160,315.

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Q. The sale of tickets on the Third Avenue line in 1920 being 145 million is twice as much as in 1900? A. Approximately.

Q. Whereas, on the shuttle, the sale of tickets in 1920—which, in round numbers is 1,500,000—is just about 100,000 over what it was in 1900? A. That is correct.

Q. Have you also made a study of the car miles operated on the 42nd Street spur? A. I have.

Q. Where did you get those figures? A. From the records of the Interborough Rapid Transit

5387 Company.

Q. Did the number of car miles operated fluctuate in the same degree as the ticket sales, following the introduction of the rapid transit facilities? A. No, they do not. They fluctuate, but not to the same degree. There is more of a tendency for the number of car miles in the spur to be the same, year after year, regardless of the amount of traffic.

Q. What is the number of car miles operated in 1883? A. 35,062.

Q. And in 1920, what was it? A. 80,393.

5388 Q. What was the number of car miles operated on the whole elevated system in 1883? A. 21,929,017.

Q. And in 1920? A. 74,434,271.

Q. So that, on the spur, the increase is from 35,000 to 80,000? A. Yes.

Q. A little over 100 per cent. and, on the elevated system as a whole, there is an increase from 21 million to 74 million, an increase of over 200 per cent.? A. That is correct.

Q. Is this the result of your tabulation of the car miles (handing paper to witness)? A. Yes.

Mr. Devery: I offer that in evidence.

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(The paper referred to was received in evidence and marked Exhibit No. 11 of this date.)

Q. Did you make any study as to the speed of operation on the 42nd Street spur as compared with the speed on the Third Avenue lines? A. I did.

Q. What did you find as to that? A. I found that, on the Third Avenue line as a whole, the average speed of the running of cars is about 15 miles an hour. This computation is based on the number of car miles operated and the number of car hours operated, as reported by the Interborough Rapid Transit Company to the Public Service Commission. I was unable to obtain, even from the Commission's records or from the records of the Interborough Rapid Transit Company the number of car hours operated on the 42nd Street spur, but I was able to get the number of car miles on the spur. In order, therefore, to find the speed on the spur, I had to make an observation of the actual running time, and I found, for the time that I personally observed, that the average was about seven minutes per round trip, from the Grand Central station to Third Avenue and back; and, in order to make allowance for any uncertainties, I took an average of six minutes, and computed the speed on that basis, and I found that, on the 42nd Street spur, the average speed is three miles per hour, as compared with 15 miles per hour on the Third Avenue line as a whole. Then, subsequently, I checked the average running time of a round trip, with reports that had been obtained by the Public Service Commission in the meanwhile and I found that six minutes per round trip, is approximately the running time.

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Q. What effect did this slow operation have on

5392 the operating expense? A. It would have the result of giving, for the spur operation, very decidedly a higher cost per car mile than on the Third Avenue as a whole, or for the elevated system as a whole. The expenses and taxes are usually computed on the basis of car miles, in terms of number of cents per car mile. Now, the much slower operation of the 42nd Street spur would naturally result in a much higher expense per car mile there than on the elevated system as a whole.

5393 Q. Did you tabulate the car mileage on the Third Avenue system, from 1916 to 1920—the annual car mileage and car hours? A. Yes.

Q. Is this it (handing paper to witness)? A. Yes.

Mr. Devery: I offer that in evidence.

(The paper referred to was received in evidence and marked Exhibit No. 12 of this date.)

Q. Now, what study have you made as to the operating costs on the 42nd Street shuttle as compared with the operation costs on the Third Avenue line? A. I first made a computation for the

5394 operating expenses and taxes per car mile, operated on the elevated system as a whole. These figures I took from the company's reports to the Public Service Commission. I presented the total figures for each year from 1916 to 1920, inclusive, and I gave the cents per car mile for each of the more important groups of operating expense; for example, maintenance of way and structures, maintenance of equipment, etc. The company does not keep its accounts by different lines. The expenses and taxes are shown simply for the elevated system as a whole. Consequently the only

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thing that can be done is to use those average figures and apply them to any particular line, with adjustment to the particular conditions on that line. So, I used the ratios of cost per car mile as shown in this statement for the system as a whole, and applied those ratios to the spur, after making adjustments for the much slower speed of operation on the spur.

Q. Well, applying these car rates, what did you find the operating cost, per mile, to be on the 42nd Street spur? Did you work that out? A. For the year 1920?

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Q. For the year 1920? A. For the year 1920 I found that the total operating expense and taxes per car mile for the entire elevated system was 21.24 cents. Now, making adjustments for the slower speed on the 42nd Street spur, I made two computations. In the first computation I allowed that the expense per car mile on the spur, would be four times as much as on the entire elevated system. I found that the speed, on the entire elevated system, was five times as high as on the shuttle; so, in this first computation, instead of using five, I used only four, and assumed that the operating expense and taxes per car mile on the spur were four times as high as on the elevated system.

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Q. You wanted to be liberal to the company? A. Yes, the idea was to be liberal; and I got then, for the year 1920, an average cost per car mile on the spur of 85 cents.

By Mr. Farley:

Q. How much? A. 85 cents.

By Mr. Devery:

Q. 85 cents? A. 85 cents per car mile on the

5398 spur as compared with 21.24 on the entire elevated system.

Q. 85 cents? A. Yes; 85 cents per car mile on the spur, as compared with 21.24 on the entire elevated system.

Q. That is four times? A. Four times.

By Commissioner Barrett:

Q. You also have the spur cost in that 21 cents, when you speak of the entire system? A. That would not affect the entire average.

5399 *By Mr. Devery:*

Q. You have tabulated those operating expenses and taxes, for the years 1916 to 1920? A. I did.

Q. On the system as a whole? A. Yes.

Q. And is this the result of that tabulation (handing witness a paper)? A. Yes.

Mr. Devery: I offer that in evidence.

(The paper referred to is received in evidence and marked Exhibit No. 13 of this date.)

Q. Now, I have a table here entitled, "Statement of Estimated Losses from the operation of the Elevated Spur on 42nd Street." Now, how did you compute those? A. I made two computations, because of the debatable character of some of the data that naturally gets into such estimates. In the first statement I first took the total number of tickets sold at the Grand Central station. Then I tabulated that number to give the total number of spur passengers a year. Then, I computed the total receipts from the spur passengers, by multiplying the total number simply by five. That gave me $152,543 for the year 1920 as the total revenues collected from passengers using the spur. On the

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basis of the postal card canvass, I then assumed that the spur passengers travelled three per cent. of their entire journeys on the spur, and 97 per cent. on the rest of the Third Avenue line.

Q. In other words, you took the percentages shown by this postal card canvass? A. Exactly; and applied the percentage to the apportionment of revenues, and in this way I assigned three per cent. of the total collections from the passengers that used the spur, to the spur. This gave me $4,576 for the year 1920. Then, I took the number of car miles operated on the spur, which were exact figures from the company's own reports. On line numbered six, I place the cost per car mile, as computed; and, as explained a few minutes ago, I have on line numbered 7, the total cost of operation, which amounted to $68,334, in the year 1920—the difference between the cost of $68,334 and the receipts apportioned to the spur, which was $63,758, which would indicate, on the basis explained, the loss resulting from the operation of the spur. That is, this would be the loss, after operating expenses and taxes, without any return on investment, had been deducted.

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Q. That is the net loss for the year 1920? A. The net loss for the year 1920.

Q. Now, you again wanted to be liberal with the company, and you made a second computation? A. I made a second computation for the purpose, I believe, of being extremely liberal. The fundamental data, as to the ticket sales and car miles, are the same in the second statement as in the first. In the second, however, I apportioned ten per cent. of the total receipts from passengers using the spur, instead of three per cent.—three per cent., you remember, was justified by the postal

5404 card canvass—but instead of three per cent. I took ten per cent. of the receipts and apportioned it to the spur. Then, as to the operating expenses, instead of adjusting all of the operating expenses and taxes to the slower speed on the spur, I took only the operation of cars—just the one group of operating expenses, of platform expenses—and multiplied those by four, although the speed is only one-fifth of the speed of the Third Avenue line as a whole.

5405 Q. Now, just explain why the speed of operation increases the platform costs? A. For example, at the time when I observed the time for round trips on the spur, I made inquiry as to the wages of motormen and conductors, and I was informed that on that road, the motormen get 86 cents an hour, and the conductors get 62 an hour. So that, between them, they receive $1.48 an hour. On the basis of only three car miles per hour, you had there, just for platform expense, of motormen and conductors, under these circumstances, 49 cents an hour. This has no regard for any other expenses—for ticket sales or station expenses,

5406 maintenance, power, or anything else. It is just simply on the basis of that slow speed of the platform expense for motormen and conductors, amounting to nearly 50 cents per car mile.

By Commissioner Barrett:

Q. You said the motorman told you he got 86 an hour? A. The motorman gets 86 cents, and the conductor 62 cents.

By Mr. Devery:

Q. This was the only item that you increased, then, in computing this? A. Yes. In the second

computation the only possible expense that is adjusted for the much slower speed on the spur, was the operation of cars; and I multiplied that cost by four, although the speed was only one-fifth of the Third Avenue, as a whole. For maintenance of way, structure, and maintenance of equipment, for power costs, for general expenses and taxes, I used the same costs as for the Third Avenue as a whole; although, of course, the slower speed has the effect throughout of increasing the cost per car mile. So I believe that, in the second computation I only erred in that I gave much 5408
more than would be reasonably justified; but, on that basis, I got $41,804 as the cost for 1920. Ten per cent. of the revenues amounted to $15,254, and this left the total amount on the spur operation amounting to $26,550.

Q. Well, of the two computations of loss, Mr. Bauer, one of $26,550 and one of $63,758—one of which is based on three per cent. and one on ten per cent., which, in your opinion, is nearly correct? A. I believe the largest is nearer correct. If I may say so, after going over all the figures, at a rough estimate I should say that $50,000 5409
loss in 1920 would probably hit it as nearly as you can determine a matter of that sort.

Q. If that $50,000 were added to the revenues of the Manhattan Railway Company, it would aid them considerably, would it not? A. To the extent of $50,000.

Q. Is this the result of your tabulation of that statement (handing paper to witness)? A. Yes.

Mr. Devery: I offer that in evidence.

(Paper referred to received in evidence and marked Exhibit No. 14 of this date.)

Mr. Devery: I think that is all.

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Cross examination by Mr. Nichols:

Q. Your method of determining the speed of the car on the shuttle, is to notice the time, catch it on the return trip—six minutes—and then divide the distance by that. Are the averages on any other car lines of any other railroad ever computed in that way? A. Well, the car miles are computed on the basis of actual runs sent in in regard to a particular line, and I made very careful inquiry as to the spur, and was unable to find any such records.

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Q. But you are estimating a speed of three miles an hour, which is the basis of your calculations of costs, as contrasted with a speed of 15 miles an hour on the elevated lines in general? A. That is correct.

Q. Now, a speed of 15 miles an hour—that is the speed which Mr. Turner, the engineer of the Transit Construction Commission, in his report last year, gets as the average speed of trains on the elevated line in the City of Brooklyn? A. I do not know what his figures were.

Q. Well, you get 15 miles, as the actual running

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speed of the ordinary train, and contrast that with the speed of a train at the end of its trip, when it stands still? A. Well, my observation has been that most of the time it is standing still.

Q. And you do not think there is anything unusual in working out a car mileage of three miles an hour? A. Not as I understand the computation for the Third Avenue system. As a rule, I believe, the standing-still time is included in the 15—

Q. You do not know? A. Why, yes; I think I—yes, I think I know.

Q. You mean to say that the actual running speed is only 15 miles? A. That was your testimony, and not mine.

Q. Well, you do not know whether that is correct. I have a report here— A. Mr. Turner's figures do not determine this thing.

Q. Mr. Turner is addressing himself to the same problem? A. But I have the exact figures as reported by the company to the Public Service Commission, and those figures include the time of trains from terminal to terminal and return, and include the stoppage at the stations, just exactly 5414 as I included the stoppage of the trains at the station at 42nd Street.

Q. But every spur and every shuttle is run at a loss, on that basis of computation, I presume? A. That, I would not state.

Q. I really do not understand why people put them on. Using your figures as a basis, you can figure out a loss after every shuttle station? A. I have computed—made estimates—for this shuttle for the hours indicated.

Q. And you attempted to solve this problem, as we have attempted to solve the problem, by 5415 finding out exactly how much it does cost? A. This is a computation to be supplemented by other data. The difficulty is that a larger proportion of the costs would never be determined. What I mean is, that a large proportion of the costs cannot be absolutely segregated for the spur, because they are joined in with the elevated system as a whole.

By Mr. Devery:

Q. This company does not make separate reports to the Commission in regard to the spur operation? A. No.

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By Mr. Nichols:

Q. There are ways of determination as to the probable cost and the probable profits involved, are there not? A. Yes, and the methods usually used are the methods I employ.

Q. You mean to say that such a method as that works out—that fantastic rate of three miles an hour would be employed by any practical railroad man? A. I imagine that if, at the present time, you proposed to erect that spur, that a practical raliroad man would use exactly those methods.

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Q. Well, you use the basis of the traffic on the ticket sales, don't you? A. Exactly.

Q. Now, do you suppose that that actually represents the actual traffic on this spur? A. It does, probably so closely that it can be used in our computation.

Q. Oh, you think the business men that have to run railroads would rest for a moment upon any such method as the computing of the ticket sales? A. They would be lucky to have such definite data.

Commissioner Barrett: In your mind the ques-

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tion of adequate service is to be determined by what your company thinks it should give.

Mr. Nichols: No, but the ticket sales are certainly not the basis to show the relative traffic. I am not advancing this argument for the purpose of reducing facilities but, in this case, of preserving them. Instead of tearing down facilities, where the greatest congestion in the world is, we are going to try to keep something there that will help solve that problem, and everything counts in such a situation. Now, you have heard testimony given here in behalf of the City, showing the traffic going from the station in certain hours,

of six thousand, as against the traffic going into the station of 4,800. 5419

Q. Now, who buys the tickets, the people who go out or the people that come in? A. The people who go into the station buy the tickets.

Q. Yes, and not the people that go out. You have there, on the basis of the testimony given this afternoon by the City, the people that go into the station are the ones who buy the tickets were a very considerable percentage less than those that went out. Did it ever occur to you, in your intensive study of the car mileage, why it was that so many people went west of that spur, greater than the number that go east? A. I think you are jumping too fast. I merely assumed necessarily an average throughout the year. I did not make any allowance for that, because there was not any basis for making such an allowance. The count for a single day may or may not establish the proper basis. 5420

Q. What would you expect, if I may ask you—why did you take the traffic figures according to those postal cards—I understood you to say that represents about four-fifths of the traffic on the "L"? A. Perhaps, as I remember the figures, but the figures speak for themselves. There were more from the north than from the south, substantially. 5421

Q. But you use the basis of six thousand, which was about the amount coming from the north? A. No, that was an average for all of them. As a matter of fact it is nearer two and a half per cent. than three per cent.

Mr. Devery: To avoid any uncertainty, there were 346 passengers that traveled north, and 982 south.

5422 Mr. Nichols: That is about the proportion I have in mind.

Q. And what was the distance that you used, you deduced, as the average ride on the elevated line of people coming from the spur that you say you got from the postal cards? A. I did not make the canvass; I took the results from Mr. Ryan, who testified in regard to this; and, on the basis of those figures, just about 2½ per cent. of the distance was on the spur and the rest on the Third Avenue line, and I rounded out the per cent. and allowed three
5423 per cent. for the spur and 97 per cent. for the Third Avenue.

Q. What is the length of the spur? A. It is reported by the company as 15/100ths of a mile.

Q. It is not 18/100ths? A. No; the running tracks is 15/100ths. Even if it were 18/100ths or 20/100ths, the difference would be negligible; and it is the same way in reference to these figures. All of these things make no considerable difference in the total results.

Q. So you regard as a negligible margin of error that 2½ per cent. does not make any difference as compared with three per cent. or 15/100ths as
5424 compared with 18/100ths? A. For this purpose that is correct. A practical man would not waste his time with any such consideration.

Q. Yet you, as presumably a practical man, took a postal card survey, which limited the traffic information to the indication of his home address? A. There might be a difference of opinion as to that among practical men.

Q. We are trying to determine just how practical we are? A. The assumption, in asking for the home address, was that the station shown on the elevated line could be more accurately determined that way than any other way.

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Q. Don't you know that a determination was had some little time ago? A. What?

Q. That 57 per cent. of the traffic came from the north and 43 from the south? A. I have been informed of that determination.

Q. And yet you took a determination of these postal cards on the basis of people who gave their home address, coming from the north most of them, that the traffic from the south, instead of being 40 per cent., was about one-fourth, instead of 43 and 57? A. Yes; but then again, as a practical man, if I took the ratios you are just mentioning, and made the computation accordingly, the results would not be materially different.

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Q. That is the difference in the ratio of one to four, and the practical results as you view them, there would be no difference between 971 and 380? A. Almost any such variations might result, but the percentage of the ride on the shuttle would at the most be four per cent. or five per cent., whereas on the Third Avenue line it would be 96 or 95 per cent. I simply submit, as a practical proposition, before a practical group of men, that it does not make any difference in such a calculation.

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Redirect examination by Mr. Devery:

Q. Have you not, as a matter of fact, allowed ten per cent.? A. In my second computation I allowed ten per cent., so far as the revenues are concerned.

Q. And in your first computation you allowed three per cent., and in the other computation you use ten per cent.; is that right? A. That is correct.

Recross examination by Mr. Nichols:

Q. Now, coming back to this postal card can-

5428 vass, by which you show the sale of the tickets and speak of the trains, from the basis of your calculations, did it occur to you that more than half of those people said they would not use the elevated at all if the spur were taken down? A. It also occurred to me that 90 per cent. of the people did not pay any attention to it.

Q. But you made this postal card canvass the basis of the calculations which you have given us? A. I do not believe I will quite admit that. It was explained as we went along just what part
5429 of the postal card canvass was used.

Q. Did it occur to you, when you found this postal card canvass gave this number of 400 from the north and 100 from the south, instead of showing 57 and 43 per cent. which has heretofore been regarded as the proper basis—did it occur to you to look up the matter in any way? A. I thought of that.

Q. Did you think of coming down to us and getting the result of some 3,000 postal cards? A. Postal cards from you?

Q. We do not give postal cards to people to take them home and take the further trouble of
5430 going to a post office box and mailing them back to us—? A. No, the conductors made them out for you.

Q. The conductors made out none of them. They are all signed and in the handwriting of the passengers themselves? A. Under instructions to the passengers. I personally observed, for the better part of an hour, the manner of filling out those cards.

Q. Then you might have asked what the result was?

Mr. Devery: Mr. Nichols may put the result in.

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Mr. Nichols: Yes, we will put the result in evidence.

A. I state, as a practical proposition, the division between north and southbound traffic, within the percentages that have been here discussed, or others that might have been reasonably brought in, do not materially affect the result of this computation. The data, of course, naturally, entering into this computation, cannot be determined so very accurately. That is the very reason for making the two computations, the first one following fairly closely certain data that have been established; the second going to what seemed to be a reasonably strict limit covering the operations on that spur.

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Q. You do not take into consideration, as a practical proposition, that if the spur were discontinued, however, all the traffic would be lost? A. I do not believe that there is any data here before the Commission that can show that that would be the case. On the contrary, if you take the number of people—if you take the number of postal cards that were sent out and take the number of cards of people who said they would discontinue using the spur, you would probably get pretty close to the percentage that we used in the first computation—namely, three per cent. I have not made that computation. Presumably any person who would be seriously inconvenienced would regret the fact that he would have to discontinue using the spur. The great bulk of the people made no reply at all, indicating that it does not make any difference. As I say, take the number of people who said they would discontinue using the spur, and applying that number to the 5,000 cards sent

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5434 out, you would get the percentage that comes pretty close to the one I used.

Q. I think you said, either as a statistician or as a practical man, that it does not make much difference, in this talk about tabulations, whether they come from the north or from the south? A. I don't think I said that.

Q. You did not say that? A. I don't think I did.

Q. What difference would it make? A. The record will show.

Q. What difference does it make? A. The dif-
5135 ference that it makes is that the southern passengers do not travel, on the average, nearly so far as the north going passengers; but any computation, if I use your figures—57 per cent. north and 43 per cent. south—the result still would be, at the most, that only five per cent. of the distance— using five per cent., I have not computed it accurately—you take no more than five per cent. on the spur; and five per cent., or three per cent., as I see it, as a practical man, that would not make any difference so far as the reasonable general conclusions are concerned. That is to say, the spur is
5436 operated at a large loss. Now, whether—of course, the exact amount cannot be determined, as my computation sets out as fully and as completely as can be—but the reasonable limits are in that, I think I have indicated fully.

Q. But the average distance of travel south of 42nd Street is two miles and the average distance north of 42nd Street is six miles. Does that indicate to your mind whether it is of importance to know whether the traffic goes south or goes north? A. It is of importance, except that the margins here we are talking about are of such character that this would not affect the results materially.

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You still would have a larger loss than I allowed by my second computation, when I allowed ten per cent. of the revenues to the spur.

Q. Then it does not make any difference? A. The most favorable assumption you can make for the spur shows a big loss. Whether you say it is ten per cent., which I took in one of my computations, or three per cent., which I took in the other one of my computations, or five per cent.—the figures you are talking about—you would still have a very large loss.

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Q. What is the distance you can afford to carry passengers on the elevated for five cents? A. It depends on how many passengers. It is a futile question to ask.

Q. Isn't there an average distance? A. Computations have been made of that sort, but there are no official records on that.

Q. If you knew that six miles was the length of probable transportation, and that a certain percentage of the people, by taking a spur, travelling north, there would not be any profit, it would break even? A. You are making such a vast number of assumptions. But you have not established that

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six miles is the limit of profitable carriage. It depends on the volume of traffic, and it may be more or less than that.

Q. So that the more traffic that is carried by existing facilities, the greater the margin of profit, as the density of traffic increases? A. What is that?

Q. The greater the proportion of profit—the greater the margin of profit as your density of traffic increases? A. That depends on circumstances too. That is another one of those questions—those assumptions—that cannot be answered.

5140 Q. Now, have you considered this fact; according to the figures this afternoon six thousand people go north do not buy tickets, and 4,800 people go south that do buy tickets? A. Considering that the condition which you have just mentioned is based on the individual count of a single day—that the tickets sales represents the actual count for an entire day's time—I do not believe that such a conclusion follows.

Q. Coming back to the significance of this traffic from the north. The great amount of traffic in the
5141 morning in the rush hour comes down there on that southbound platform which creates a standing invitation for people to use the shuttle; is not that the situation? A. As people come down Third Avenue and go there to the shuttle, the question is; does that constitute a standing invitation to use the shuttle?

Q. Yes? A. I should say, yes.

Q. And in the other direction, when they are going away from their work at night, and not under pressure to get to a certain place at a certain time, the traffic along that spur is very much less? A. I
5142 do not know whether it is or not.

Q. That is the first thing that occurred to me—to have an actual count. A. But with a matter of that kind, the count of a single day may or may not show the facts. Even assuming that what you say is correct—assuming the accuracy of that—I do not, but suppose we do—and then adjust the first and second computation in full proportion, and you still show a large loss on the spur. Again, the margins here are so wide, that any one of these factors which you have mentioned, will not change the results any.

Q. You tabulated the ticket sales? A. That is what I did.

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Q. Would you be surprised to know that, as the result of actual count, corroborating the testimony given this afternoon by the City's witness that the actual number on that spur was some 296 per cent. of the tickets sold at that station, instead of being 200 per cent? A. How is that?

Q. Would you think that is correct or not? A. I am sorry, but I did not get your question.

Q. (Question above recorded repeatedly by the stenographer.) It is only three times as much? A. The actual traffic is nearly three times.

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Q. Yes? A. I would be surprised to find that it was, but if I were to adjust my computations on that basis, it would still show large losses on the spur. That is what you come to in every one of those things.

Q. Now, have you looked up any other aspect of this traffic problem at 42nd Street except this question of whether the Interborough would lose or not—lose money in the operation of this spur? A. That is a pretty broad question.

Q. I know; but that is all you have testified to, as to whether or not we would lose money, or would not lose money? A. I was connected with the Commission a number of years and made traffic studies all that time, and I have been interested in the traffic around 42nd Street, and I have studied this particular problem now offered from the standpoint we have presented.

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Q. That is, the standpoint of cost? A. The standpoint of cost and volume of traffic at the present time on the 42nd Street spur.

Q. The volume you have only taken from figures given you? A. As explained in my testimony this afternoon.

Q. Now, if it is true that at least 25 per cent.

5446 more passengers travel west on that spur because it is more convenient to step across the platform, or for some other reason, you consider that a spur that provides any function in making it possible to deflect traffic from the subway to the elevated railroad—the fact of its convenience—the psychological suggestion of the existence of an elevated railroad—is that to your mind a factor? A. A factor in what?

Q. In taking people from the overcrowded subway to the elevated railroad? A. The presence of
5447 the spur, you mean?

Q. Yes, the presence of the spur? A. Oh, it might be a factor, but anything might be a factor. It is a question of how much of a factor it is. I don't know; do you?

Q. I am asking you? A. I don't know, nor do you.

Q. Now, do you know that, while the traffic at 42nd Street station in the last five years has increased 114 million—? A. What is that?

Q. 114 million in the last five years and that the traffic on the elevated lines, the Third Avenue ele-
5448 vated, is less than it was five years ago—would you consider that a statement in line with the knowledge you have obtained in your office with regard to these transit questions? A. Yes, I have been aware that there has been an increase in traffic going through the Grand Central station. I have not computed its volume, and have not compared it for the present year with five years ago.

Q. Would you be surprised to know that the traffic in the Grand Central station—? A. You mean the subway?

Q. No, just that one station—? A. You are asking too much. I have not looked up those figures.

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Q. Do I expect too much that, with regard to this question of taking care of the tremendous increase of traffic at 42nd Street, we should look to the future and consider the relation of the elevated railroad and these spur facilities—is it asking too much to consider that phase of the problem? A. No, but all of those things are to be considered in relation to one another. I have not had a chance to compute the volume of traffic through the Grand Central.

Q. Can you tell me, in respect to any one of the transit facilities on 42nd Street, what has been the increase during the last year? A. I have not made the computation.

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Q. Would it surprise you to know that the increase has been over 22 per cent.? A. Through the Grand Central?

Q. No, all the stations on 42nd Street? A. Excluding the Grand Central?

Q. Including the Grand Central?

Mr. Devery: I think Mr. Nichols ought to take the stand.

Commissioner Barrett: The witness does not have to answer him if he does not know.

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Mr. Nichols: The witness apparently has not taken into consideration the traffic problem there at 42nd Street.

Q. Now, it has greatly increased, at any rate? A. That has been my impression. I haven't the figures before me, but, generally speaking, I believe that there has been an increase but, in spite of that, the spur has diminished for the last three years.

Q. You know that is because the Lexington Avenue subway has been built? A. Is that so?

Q. You said so? A. No, I did not.

5452 Q. I said presumably? A. Well, I will stand by the record. Go back to the record, if you want.

Q. Now, you also have observed that in three years the traffic on that spur increased 54 per cent.? A. Increased?

Q. Increased, yes? A. During the last three years?

Q. Take the years from 1901 to 1904, for instance? A. That is different.

Q. Did that suggest to your mind that there is a possibility—a high degree of probability—that
5453 there is going to be an increase in the amount of people using that spur? A. No, sir; it does not.

Q. Why do you think that the people going to 42nd Street are going to go—what else are they going to use? A. Prior to 1904 there wasn't another rapid transit connection between the Grand Central station and the lower end of Manhattan. At the present time there are various choices that can be exercised. I would be very greatly surprised if, during the next five years, there should be any such increase, anywhere near such an increase on the traffic of the spur as took
5454 place between 1900 and 1904. Of course, anything is possible.

Q. That traffic on the spur, of course, is only the traffic on the elevated lines? A. Yes.

Q. And you are aware that, in the last five years, the elevated railway lines have been very greatly improved in their facilities—the Third Avenue running the complete length of Manhattan, and that many improvements have been made which now permit of a very great increase in service; you know that, don't you? A. Yes.

Mr. Devery: It is also to be noted that the traffic increased from 1916 to 1920, according to

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your tabulation, 148 million in 1916 and 145 million in 1920.

Mr. Nichols: Exactly, just as it decreased in the period before that to which I have called attention. The traffic on the elevated lines actually went down during the ten-year period preceding 1901; then it shot up over 50 per cent. in three years.

Q. Now, how long do you think the computation of the subways is going to keep up. Is there much more room in the subways? A. There seems to be.

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Q. That is your observation as a practical man, in the rush hours? A. As a practical man, during the rush hours I have been surprised—

Q. Now, subways cannot be built in less than five years? A. There is a new Commission coming in and you cannot tell.

Q. Can anybody build them in five years. It was nine years between the building of the first subway and the building of the second one? A. What is that?

Q. I say it was nine years between the building of the first subway and the building of the second one. A. I do not recall definitely; it may have been.

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Commissioner Barrett: So that there may not be any confusion about it, I might say that the Commission as now constructed does not build subways.

Q. Now, Mr. Bauer, do you think that subways can be erected at 42nd Street or anywhere else within the next five years? A. No.

Q. You say no? A. Under what conditions?

Q. Any reasonable, practical conditions—we will use the word practical? A. I should say it is fairly

5458 within reason to expect that a subway line could be put through in five years.

Q. That might be, but do you consider it reasonable to expect it is going to happen in five years? A. I cannot foretell the political tangles that are likely to arise in five years.

Q. I do not refer to political tangles; I am referring to physical conditions? A. I should think that if practical men—you and I and a few engineers—would turn loose on this job, we could get subways through in five years.

5459 Q. And provide the money? A. Yes; of course, that is important.

Q. Is it a fair statement that the subway system at 42nd Street has already reached the point of saturation? A. Not with the Interborough management.

Q. I mean as a physical fact, because it is a serious fact—isn't it? A. I should not be prepared to say that it has. I cannot speak as an expert on that, for the simple reason that I have not studied that angle of it carefully enough. My general impressions are that there is great crowding there, and all of that; and yet if you throw this

5460 entire additional traffic—this entire spur traffic—on the subways, and it were divided, as it probably would be, between the east side and west side and scatter it over the day—it naturally would divide itself in that manner, so it probably would not too seriously burden the subway traffic further than it is already burdened. Of course, that is a hasty assumption. Remove that spur and probably—my guess would be that certainly not over 10 per cent., if 5 per cent., would be thrown on the subway—that the great bulk would continue riding on the Third Avenue Line.

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Q. The postal cards, on which you base your assumption—? A. That certainly showed that the great majority did not care anything about it and that they would continue there on the Third Avenue.

Q. And you relied upon that postal card count for the computations which you made? A. No, what I relied upon was the relative distance in the route, and in regard to that there is a greater probability that out of the 444 replies you would get some sort of a picture as to the distance of the route, but when you want to find out as to the

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number of people who would quit using the spur, then if you don't hear from 90 per cent. of the people, I submit that the situation is very, very different. In the first case, the data is more or less reliable, and in the second case it is not at all.

Q. Do you know that about 50 per cent. are using the spur—50 per cent. more than used it eight years ago? A. No, I do not.

Q. These figures that you have for eight years ago—well, seven years—1913, it is 1,053,000, and now it is 1,525,000? A. That is correct.

Q. A 50 per cent. increase on that spur in seven years? A. I see.

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Mr. Devery: You also know there are 900,000 less than in 1904.

Q. Yes. Did you know we used to have a through operation of that spur to Grand Central—of trains through? A. I have been informed that was so.

Q. Do you know the date it was discontinued? A. No, I do not.

Q. Do you know we used to have a connection into Grand Central station from the spur station? A. Perhaps so; I really do not know.

5464 Q. Now, those facts have some relation to these changes in the traffic shown? A. Yes, there might be a relation.

Q. That where you take out a connection with the Grand Central station that was relatively more important then than now might make a difference. But the layout being taken out—do you know about that? A. No.

Q. So there has been very considerable fluctuation in the traffic on that spur? A. Substantial ones.

5465 Q. It was below a million in 1906, when the subway cut into it, and when the second subway was built it is 1,525,000? A. That is right.

Q. So that it stood the competition of the second subway far better than it did the first? A. That seems to be so.

Q. Now, if it is true that in the next five years there will be no further building of subways, and there is an enormous increase in traffic at 42nd Street, do you not expect a proportion of that to go to the elevated lines? A. It depends on what you mean by "great." I should expect some increase in the spur.

5466 Q. Do you not think that, with the present overcrowding of all the facilities in 42nd Street, with the exception of the Second and Third Avenue lines, that the people will have to go to the elevated railroad? A. You are making a big assumption.

Q. This transportation has made the 42nd Street district the great district it is? A. For a comparatively short time there has been a rapid increase in traffic, and the year 1920 was a remarkable traffic year. Now, traffic has not been increasing during this past year in any such ratio, and there is no basis for expecting the 1920 increase right along.

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Redirect examination by Mr. Devery:

Q. Now, Mr. Bauer, taking the 56 per cent. of those people using the shuttle, between 7 and 10 o'clock, according to the figures introduced here, or 3,000 in round numbers,—suppose those 3,000 people who use the spur those three hours in the morning from 7 to 10 A. M., were transferred over to the subways, would it have any appreciable effect on the congestion in the subway? A. Of course, I have not made a precise study of the subway congestion at 42nd Street during those hours on the west side line; but simply as a general 5468
proposition why, of course, it would not be, relatively speaking but a drop in the ocean of traffic at that point, into the streams of traffic. It would add to the congestion, of course.

Q. But it would not do so appreciably? A. It would not.

Q. Supposing the spur on 42nd Street were removed, you do not believe the half of traffic would discontinue the use of the elevated line? A. No, I should not think so.

Q. They would walk to the elevated, just as they do at other stations? A. My judgment would be 5469
that the great bulk, certainly 90 per cent. or more of the passengers would continue to use the elevated, though we haven't any precise data to show that.

AMOS SCHAEFFER, a witness appearing in behalf of the Applicant, having been previously sworn in this proceeding, recalled for further direct examination, testified as follows:

Direct examination (Resumed) by Mr. Devery:

Q. Mr. Schaefer, you were here the other day, when Mr. Nichols insinuated that this movement

5470 was not a movement in behalf of the city but on behalf of the property owners? A. Yes, sir.

Q. Now, is that a fact, Mr. Schaefer? Isn't this proposition a city improvement? A. It is a city improvement.

Q. What is the necessity for the improvement? A. The necessity for the improvement is to open 42nd Street for traffic to Park Avenue, to make it more available for traffic.

Q. It is an improvement that has been under consideration by the Borough President for a long
5471 time, has it not? A. Yes.

Q. And the Borough President was responsible for the introduction of the first bill to provide for the elimination of the spur on 42nd Street? A. That is my recollection.

Q. The act of 1917? A. Yes.

Q. He is also responsible for the second bill, the Act of 1919? A. I so believe, yes.

Q. He has made every possible effort that he could to accomplish the removal of this spur, by agreement or otherwise? A. Yes.

Q. You consider that these elevated pillars on
5472 42nd Street are an obstruction and a detriment to the surface of the street? A. They are a great obstruction.

Q. And it is in the line of improvement for the city to remove them? A. Yes.

Q. The city is now widening the roadway west of Madison Avenue, is it not? A. The city has under contemplation now the widening of the roadway between Madison Avenue and Park Avenue on the south side.

Q. That will increase the traffic east of Madison Avenue? A. That will facilitate traffic east of Madison Avenue.

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Q. The vehicular traffic? A. The vehicular traffic.

Q. And it is absolutely necessary to widen the roadway at 42nd Street? A. It was so considered a good many years ago, but the way did not seem to be open until now to carry out the physical widening. The resolution of the Board of Estimate and Apportionment to make a widening was adopted in 1912. It was believed at that time it was necessary to widen it.

Q. If these elevated obstructions are removed east of Park Avenue, will not a lot of the traffic go east on 42nd, and go up and down on the other streets? A. It would, but I doubt that alone would invite a large majority of the traffic further east. More than that is necessary, and Lexington Avenue already has been widened from 42nd Street to 51st and Madison Avenue will be widened this coming summer. Now, along these lines, I listened to the testimony given today, and the questions asked, and I do not think it is a fact that there is any dead line as to traffic to the east. I think there is considerable evidence which will show that is not so. For example, when the Grand Central improvements were made under the Act of 1903 and 1905 and Depew Place was acquired by the New York Central—the City held the fee title at that time—it was thought that there would never be any need of having Depew Place as a thoroughfare.

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Mr. Devery: That is all.

New York City, March 30, 1921.

Met pursuant to adjournment in the Hearing Room, Public Service Commission, 1st District, No.

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49 Lafayette Street, New York City, at 2:30 o'clock p. m.

Before: Hon. Alfred M. Barrett, Commissioner, Public Service Commission, 1st District.

Appearances: Terence Farley, Esq., Counsel for the Public Service Commission, 1st District, and H. M. Chamberlain, Esq., Assistant Counsel. John P. O'Brien, Esq., Corporation Counsel for the City of New York, by Mr. Devery, Assistant Corporation Counsel. J. O. Nichols, Esq., Counsel for the Manhattan Railway Company. Arthur G. Peacock, Esq., Counsel for the Interborough Rapid Transit Company. E. W. Forrest, Esq., Secretary of the 42nd Street Property Owners & Merchants Association.

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JOHN BAUER, a witness appearing in behalf of the Applicant, having been previously sworn in this proceeding, further testified as follows:

Redirect examination by Mr. Devery:

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Q. Mr. Bauer, have you made a further examination of the records of the Public Service Commission to ascertain the sale of tickets on the 42nd Street, 34th Street, 23rd Street and 14th Street stations for the last five years? A. Yes.

Q. You have the sales on the 42nd Street station? A. Yes.

Q. How have they increased in that period, or have they increased? A. The elevated ticket sales on the elevated stations at 42nd and Third Avenue have increased between 1915 and 1920 approximately one million.

Q. What were they in 1916? A. In 1916 they were, for the total traffic, north and south, 2,303,728, and 1920, the fiscal year, 3,339,140.

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Q. An increase of over a million? A. A little over a million.

Q. During that same period the sales on the shuttle station did not increase at all? A. They were practically stationary in 1916. On the shuttle the total was 1,537,904 and in 1920 they were 1,524,427.

Q. How did the ticket sales on the Third Avenue station at 42nd Street compare with the ticket sales at 34th Street, 23rd Street and 14th Street? A. I have on this tabulation before me only the 14th Street, and I find that, on the 14th Street elevated 5480
station, the total sales in 1916 was 3,896,562, in 1920, 3,877,005. That means that they were practically stationary—no change. For 23rd Street, from a separate memorandum, I find the total sales in 1916 were 4,443,495.

Q. What station is that? A. That is the Elevated station at 23rd Street and Third Avenue. In 1916, they were 4,443,495; in 1920, 5,076,154, an increase of 600,000 in round numbers. On 34th Street, I have just run down and gotten the figures, but I haven't them added, but, generally speaking, the same situation prevails, that practically there 5481
has been no change in the number of sales between 1920 and 1916. The general point is that on 14th Street, 23rd Street and 34th Street, on the Third Avenue line there has been practically no increase in the number of ticket sales between 1916 and 1920. There was some increase on 23rd Street during that time, whereas, on the 42nd Street, there was a substantial increase—a million, and that took place at Third Avenue while the shuttle traffic remained practically stationary.

Q. Are the physical conditions in 14th Street the same or similar, to a great extent, as they are

5482 on 42nd Street? A. As to the relative layout between the Third Avenue elevated and the subway, running north and south, and the character of the stations yes. The only difference is there is not a shuttle elevated spur at 14th Street, and of course the character of the neighborhood has been changed. 42nd Street has been growing and developing, and I assume 14th Street has not been changing as rapidly.

Q. Assuming that at 14th and 42nd the elevated and the subways are competing for the business?

5483 A. Yes.

Q. The distance between the stations are about the same? A. Yes.

Q. Regardless of the fact that the conditions are the same, 42nd has increased a million and 14th Street has remained stationary? A. That is correct.

Q. What is the general conclusion you draw from that? A. The general conclusion seems to be that the Third Avenue station at 42nd Street has been getting the due proportional benefit of the 42nd Street district, without regard to the elevated spur. The traffic on the spur has remained

5484 stationary during that period. The general section has developed. The ticket sales on the elevated at 42nd and Third Avenue have increased by one million—that is, roughly, by 50 per cent. That would indicate that the elevated at 42nd Street has gotten its due proportion of the development of that region, without getting any assistance, during that period, from the shuttle.

Recross, examination by Mr. Nichols:

Q. Were you here when the testimony was given, showing that the actual traffic on the 42nd Street

spur was 298 per cent. of that indicated by the sale of the tickets? A. Will you repeat that?

Q. I say, were you here when the testimony was given, showing that the actual traffic on the 42nd Street spur was 298 per cent. of that indicated by the sale of tickets—approximately three times the sale of tickets—at the spur station? A. No, I did not hear that.

Q. Do you desire to challenge that statement? A. I do not believe I said that.

Q. I want to know if you do now? A. I do not believe I have any ground for challenging or accepting that. That is your testimony, and I am not here to challenge it. 5486

Q. You knew that we had reported, as a result of actual count, a year ago, the number of passengers in connection with this 42nd Street spur problem, that the east traffic on the spur was 15 per cent. greater than the number of tickets sold, did you not? A. The eastbound traffic?

Q. The eastbound traffic on the spur is 15 per cent. greater than the traffic shown by the tickets sold? A. You reported that to whom?

Q. Didn't you know that? A. I am trying to get your question. 5437

Mr. Devery: You mean the westbound?

Mr. Nichols: No, I mean the eastbound.

A. I really did not get the full purport of your question.

Q. Well, you came down to see our people about these traffic statistics a little while ago? A. Exactly.

Q. You had with you a letter containing a statement prepared by the Interborough Rapid Transit Company, showing that the eastbound traffic was 15 per cent. greater than the number of tickets

5488 sold? A. Yes, I had a letter, and I have that in my possession now—

Q. What is that letter? A. —which made a computation of the east going traffic on the spur as being 15 per cent. greater than the number of ticket sales. Now, since you raise the question, I think I ought to be permitted to explain all I got from your office in that connection.

Q. You can do that on redirect examination. I just want to bring out the point that you knew that? A. I knew that, and I also challenged the

5489 correctness of that. I made inquiry at your office what the significance of these figures were, and the explanation was what I supposed it was, and I got admissions from the men with me that probably the statement was incorrect.

Q. You got a statement from whom? A. From Mr. Bruce.

Q. And Mr. Bruce said he thought that that was incorrect? A. That the conclusion that these figures were intended to convey was probably incorrect.

Q. What conclusion? A. That the eastbound

5490 traffic was 15 per cent. greater than the number of ticket sales at the Grand Central station.

Q. Didn't you say at that same time you thought the spur ought to be retained, in view of the showing you got? A. I do not recall any such statement.

Q. You did not make that statement to Mr. Bruce? A. I do not recall that I did.

Q. Now, did you know that your own count, made by the City, showed an excess of westbound traffic of six thousand as against 4,811, an excess of eastbound over westbound? A. Whatever those figures were, I haven't them in mind.

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Q. Did you also know that a year ago we reported to the Borough President, the results of a careful investigation of the comparison of the north and southbound traffic—43 per cent. as against 57? A. I do not remember definitely the occasion of how those figures were used. I have seen such figures coming from your office, that there was such a division; just what the occasion was I do not recall definitely.

Q. And you knew that a year ago we had made a careful count showing an excess of 15 per cent. in the eastbound traffic over the ticket sales. You know that? A. No, I do not.

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By Mr. Devery:

Q. You knew he said he had? A. I knew what that letter stated, and I am also prepared to explain, as I understand that letter, and I am also prepared to say that Mr. Bruce's opinion agreed with mine as to the meaning of that letter—that the conclusion was erroneous.

By Mr. Nichols:

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Q. That was the letter—is 15 per cent. right? A. That is the question.

Q. Do you know whether that is right or not—can be computed with absolute accuracy by counting the actual tickets in the box and comparing with the tickets sold? A. If you take a long enough period of time to do it, I think that would test it. I would not agree that a day or two or three days' count would show it. If you take a long enough time, I would say yes.

Q. How many actual days was this comparison based on? A. I haven't any idea.

Q. You assume it is incorrect without knowing

whether it was one day or 20 days? A. I assumed it, after talking with your own men about it, and when they agreed with my own view of it. I tried sincerely to find out how it was computed. The letter does not explain how the 15 per cent. was derived and I tried to find out what it meant, and I had preliminary ideas as to what it probably meant. Your men agreed with those ideas, that they were probably correct, and they agreed with me that the conclusion the letter meant to draw was probably erroneous.

5495 Q. If there is any man who agrees with your idea, I wish you would state who it is? A. The man I was talking to directly was Mr. Bruce.

Q. Do you want to implicate anybody else by agreeing with you? A. You mean relating to the question as to the amount of those figures?

Q. Yes. A. There was another man there with Mr. Bruce.

Q. Will you inform me who he is? A. I do not know.

Q. You based your entire calculations upon the supposed loss to the Interborough Rapid Transit
5496 Company involving an operation of that spur, on the basis of the tickets actually sold, and did not try to find any of the real facts in the case at all, is that the idea?

Mr. Devery: I object to that question.

A. I do not think that is true, no.

Mr. Devery: We have been trying to find all the facts in the case.

The Witness: I certainly have. I explained in full detail, and then some, what that calculation was and the assumptions carried out.

By Mr. Nichols:

Q. I do not care anything about your calcula-

tion. What I do care about is the inaccuracy or accuracy upon which the basis was made. The basis is the ticket sales? A. The basis is the ticket sales.

Q. And if the ticket sales did not show the traffic, your whole conclusions are worthless? A. I think you are in error as to that.

Q. You do not think 50 per cent. difference? A. You have not established, in the first palce, a 50 per cent. difference and, considering the wide margins in these computations, even allowing the 50 per cent. difference and a lot of other things, it 5498
would still show that the spur is operated at a deep loss.

Q. That is it; 50 per cent. does not make any difference to you? A. It does not in these figures. Get somebody who can figure, and you will find that is so. The table stands by itself and your assumptions can be carried through the table.

Q. I am only getting at the basis of accuracy—something by which you can measure whether you relied upon facts or not? A. I have taken the facts that could be most definitely ascertained, without relying upon the haphazard counts that might re- 5499
act one way or the other as to the kind of day that would be chosen for the count. As to those definite facts you can make wide, very wide further assumptions, but you cannot get away from the final fact that the spur is operated at a large loss.

Q. You have said it depends upon what day it is taken? A. What days of the week.

Q. What days of the week do you consider fair, and how many days? If it is going to take a month, for us to try to find out, let us do it under the direction of the Public Service Commission and find out the facts? A. It has not been my

5500 problem to determine just what days should be selected, but it is perfectly clear that a count on any one day might miss the facts.

Q. The Commission has an ample force, and it is very easy to count the cancelled tickets in the box during the day, and we can find out about this 14 per cent. plus, as it was found, and see how much truth there is in the statement? A. You mean try to establish how that 15 per cent. was determined?

Q. Let me state— A. I am perfectly willing to
5501 find out about that.

Q. It is in evidence, in the record today? A. That 15 per cent., of the explanation is anything different from what I was able to get from your office—

Q. It is a statement of fact, that we actually counted the number of people, and that was the statement contained in those letters of April last that you saw, and it was the same count which determined the relative proportion of the north and south traffic which you said the other day you knew. That is a statement of definite fact. It was
5502 further testified to today that, on that method of determining the number of tickets in the box, the number cancelled were actually counted and the number of tickets sold was known; and the difference between the two was some 14 plus per cent.? A. Then I shall simply state here that the explanation—I shall qualify that—the explanation as to the probable meaning of that 15 per cent. that I was able to get from Mr. Bruce was different from that. Now, he was speculating as I was, as to what the 15 per cent. meant. It was not explained in your letter; it was not clear at all.

Q. Now, perhaps, after all, we are not going to

quarrel about a question of fact, because the letter merely stated a question of fact, and also gave the total amount of passengers upon which that fact was based. You simply question some deductions made from it? A. I did not question the fact, but I usually want to know how the fact was determined.

Q. Now, I have told you that the fact was determined first, by an actual count made of the passengers and then by a comparison of the tickets sold? A. My reply is that, from a considerable period of time—take a reasonable period of time and proper days are selected, with the difference that you indicate, if there would then be established a difference of 15 per cent., then that would probably indicate fairly that the traffic was larger than the ticket sales. But one day's count would raise the presumption that there might be such and such a condition existing as of that day, and I do not think it would prove it.

Q. Well, the statement has been made it was determined on account of two days of actual passengers? A. Two days would be better than one, but it would not be conclusive, and if you add the 15 per cent. to my computation—

Q. I do not care anything about your computation whatever. I want to get at the fact as to whether you question the accuracy of our statements and the determination as to the actual number of people using our spur? A. I do not have to pass on the validity of your proof, and as far as I am concerned, if these counts were accurately and actually made, two days' count would be better than one and would raise a better presumption than one day; but I would not admit at all that they prove the matter finally nor actually.

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5506 *Claimants' Exhibits.*

Q. You based another one of the bases of your determination, as to the supposed loss in the operation of the spur, on the number of people who travel north as against the people who travel south. Now, you determined that with a postal card canvass, gotten out on a single day, of which, out of 5,000 cards issued, 440 were received.

Mr. Devery: No, it was held on three days.

Mr. Nichols: I understood they were given out on one day. That was sufficient for you to determine that important fact, as to the number of peo-

5507 ple using our spur.

A. Well, that was what was used. I think it was not sufficient. Now, let us get at the facts. It was not sufficient; I wished to have more; but then, at the same time, it was indicative, as a single figure it was usable. But again, go back to my statement, which I have repeated again and again and will continue to do so as long as you continue with this futile line, allow all these margins, and it does not make any difference; you still show a large loss for the spur. The reason I presented two computations, with such tremendously different results,

5508 was to allow for the uncertainty of these factors; and in the second computation I went to the limit of allowing and minimizing the charges against the spur, and then even there I showed a loss of $20,000.

Q. Facts did not make much difference to you, whether it was 97 per cent. distance travelled on the Third Avenue as against three, or 10 per cent.? A. It is so futile and utterly foolish as a question—

Q. You think the facts are futile and foolish, and you do not regard them? A. The facts and points that you have been arguing from, are.

Mr. Devery: I think we are wasting a lot of

time. Mr. Bauer has stated just how he made his computations. He allowed for mistakes and inaccuracies.

Commissioner Barrett: I know it, but he is his witness, though.

By Mr. Nichols:

Q. The sole point I want to find out is if you want to revise your conclusions, in view of the more accurate facts which we are presenting? A. I will be very glad, with the consent of Assistant Corporation Counsel, to take my statements of last 5510
time and revise them from the standpoint of every extreme assumption that you have been making. You are working here with assumptions, with partial facts and assumptions. I will be willing to use every one of them and work out a statement, but my belief now is it will show a large loss for the spur.

Q. Mr. Bauer, we are not working on assumptions? A. Sure you are. You are working on assumptions when you make a two-day count or a one-day count to take the percentages that you get and apply them to a year's operations—when you 5511
do anything like that you are certainly working with assumptions. Now, then, I am willing to take any of the assumptions you have put forth here and work out a statement, and it will show a loss.

Commissioner Barrett: Now, we have gotten this far with that. I think, if you have nothing more on that particular question—

Mr. Nichols: No, I have nothing more.

By Mr. Devery:

Q. This letter that Mr. Nichols refers to, what letter was that? A. I have a copy of it here.

5512 Mr. Nichols: I would suggest, Mr. Commissioner, that it seems to be rather an important determination as to how many people use this spur; and if there is any question as to the accuracy or self-sufficiency of our count to give a close approximation of the development, we will be very glad to have the Commission make an independent count to establish this fact. We think we have approximated the facts very closely by our methods.

Mr. Devery: We would like to have the Commission make a count too.

5513 Commissioner Barrett: The fact of the matter is that we have made a count, but the figures are not compiled as yet; but the count has been made. Immediately after the last hearing I instructed to have a count made, and at the proper time we will bring in those figures.

By Mr. Nichols:

Q. Now, going into the question about the traffic at 14th Street, and so on. You know that the Lexington Avenue subway was opened on August 17, 1918? A. Yes, about that time.

5514 Q. And has a station right there next to our spur station in 42nd Street? A. Yes, about that.

Q. It is right there, isn't it? A. Yes.

Q. So that there is a new and very close competition with the Third Avenue line established by the opening of that new subway?

Commissioner Halley: Which furnishes an additional reason for the removal of the spur.

Mr. Nichols: If the traffic now was known to the Commissioner to be 50 per cent. more than it was before that spur was built only eight years ago, I do not think it does show a reason why the spur should be removed. People from the

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Bronx who use this facility coming from the north, as most of them do—poor people, five-cent fare people—not the automobile people, like Mr. Bowman and his associates.

Commissioner Halley: It is not necessary to characterize this proceeding. This is a proceeding brought for the purpose of a judicial finding, and you are lawyer enough to know that you are not going to make out a case by making characterizations of that sort.

Mr. Nichols: I am not making any characterizations, but if you are going to judge the case before it is finished—

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Commissioner Halley: Indeed we are not, but we want a lawyer appearing before us to conduct matters as he should. There is no use bringing in these references to hotel interests, large or small. Of course, they are interested, naturally, they have property rights. Proceed.

By Mr. Nichols:

Q. Now, Mr. Bauer, you know this traffic has greatly increased from a few years preceding the opening of the subway, do you not? A. The traffic on the spur station?

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Q. On the spur station? A. It has increased since the opening of the Lexington Avenue subway?

Q. No, since the time before that; that it is larger now than before the subway was opened? A. Oh, no, I do not know that.

Mr. Devery: The figures show just the opposite.

The Witness: The figures on the spur, just prior to the opening of the Lexington Avenue subway, were 1,862,464. This past year, 1920, they were only 1,525,427.

5518 Q. Let us look a little further? A. In 1920 they were about the same as 1916, if you go back far enough. Just after the opening of the original subway, two years after, traffic fell down one million.

Q. And it kept down until 1912, when it reached its minimum. The effect of the original subway lasted eight years and cut the traffic in half? A. It never did catch up the original traffic.

Q. Didn't it cut down the traffic one-half the original subway? A. Yes.

5519 Q. And then it increased 80 per cent. very rapidly? A. No, not rapidly; it increased 80 per cent. over a period of years.

Q. So, after the original subway was opened, you find a period of recuperation? A. Over a period of 12 years.

Mr. Devery: Now, that is his answer. If you want to testify, take the stand.

By Mr. Nichols:

Q. What years? A. The low point is in 1906 and the high point is in 1918.

5520 Q. Your figures are by fiscal years? A. Exactly, yes.

Q. The figures I have are by calendar years and are brought so much nearer to date? A. Oh, well, that difference is the difference between tweedle-de-dee and tweedle-de-dum.

Q. It is? A. Yes.

Q. But that would show that the traffic on the spur had already begun to rebound from its low level after the second subway, the Lexington Avenue subway, had been opened for two years; if that is so, wouldn't that indicate that the trend had just started upwards another 80 per cent.? A. Yes, but you haven't any figures to show that.

I have here the figures for the Grand Central station, for the six months ending December 31, 1920, and the sales for these six months totaled 769,588, which is approximately at the same rate of sales as during the preceding fiscal year. 5521

Q. Approximately it is larger? A. It is not.

Q. Approximately is it larger or not, yes or no? A. It is not larger.

Q. Larger than the preceding six months? A. But my answer is perfectly clear. The sales during the last six months ending December 31, 1920, were not larger at the rate of the preceding fiscal year—n-o-t. 5522

Q. I am asking whether it was larger than the corresponding six months of the preceding year? A. Well, that I haven't here.

Q. Well, I have the figures of the last calendar year? A. Then you have the preceding six months for the corresponding six of the preceding year.

Q. I have them for the year? A. All right; that does not give you the comparison of the figures for the six months ending December 31, 1920, with the corresponding six months of the year before. If you have those figures you begin to show something; if you haven't, you don't. 5523

Q. Do you think it does not show anything if the figures for the complete calendar year of 1919 show a number of 1,504,000, while in this last year, the calendar year of 1920, it shows 1,537,500, showing that the corner had been turned. Have you any idea as to what the traffic is going to be in the next five years? A. No, and you haven't either. Anything you say, or anyone says, as to that is a guess at this time.

Q. You do not judge the future by the past? A. Oh, more or less the future depends on the past.

5524 Q. Now, what is the past of elevated lines—elevated traffic at this spur station and elevated lines generally? Is it not a fact that, with the electrifying of the surface lines, it was at a standstill for years until that competition was exhausted? A. Until what is exhausted?

Q. The competition of electrifying the surface lines. Do you know anything about that? A. I presented some figures myself in regard to that factor, but whether the competition is exhausted or not I do not know. I cannot say as to that, but

5525 I presented figures myself that showed the fluctuation of the traffic at that spur, and remarked about the probable cause.

Q. Just confine yourself to my question? A. That is a pretty difficult thing to do.

Q. After the electrification was completed of the surface lines, do you know that there was an increase on the elevated line of approximately 60 per cent. in three years; yes or no? A. Well, that could be determined.

Q. Or 54 per cent. on this spur, as testified to by you yesterday. That is the first element of serious

5526 [redacted]?

Mr. Devery: Increase in what?

Mr. Nichols: Increase of traffic on the elevated lines. It has happened before and we believe it is going to happen again.

Mr. Devery: Following the electrification of the street surface lines?

Mr. Nichols: Following the electrification of the street surface lines. That was the first serious cause of competition with the elevated lines. There was an actual decrease in a period of ten years, during which that competition was being carried on and the lines one after another, being electri-

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fied, a very extraordinary thing in view of the great increase in general traffic throughout the city.

Mr. Devery: I don't see what that has to do with the 42nd Street Spur.

By Mr. Nichols:

Q. You are arguing that there is no need of this spur in the future? A. That is not any argument. What is the use of that sort of thing?

Q. You are an expert on what, Mr. Bauer? Do you know anything about traffic? Is that what you are testifying about?

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By Mr. Devery:

Q. Tell him what you know about traffic? A. Oh, Mr. Corporation Counsel, I cannot tell him what I know about the traffic.

Q. Tell him the many years you have been studying traffic conditions in New York City. And you have not confined your studies to the elevated lines?

By Mr. Nichols:

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Q. And you don't think it is at all interesting, in view of the situation that exists at 42nd Street—interesting and significant—to look at the history of what has happened with regard to elevated traffic on this spur? A. Who said anything of that sort?

Q. I want to know whether you consider that important or not? A. Of course it may be.

Q. Let us consider it then. Let us start with the constitution that was first effective in respect to the elevated railroad, this electrification of the surface lines. Do you know anything about that? A. Now, so far as I have the figures here, in 1890 the traffic on the spur went up to over two mil-

5530 lion—2,052,317. That is the calendar year. Then, according to the figures that I possess here, the traffic went down to 1,413,052 in 1900. It may be that there was a lower year than that. I haven't the figures in between.

Q. I have all the figures here? A. Then may I ask you whether there was a lower year than 1900?

Q. Not at that time; not until after the subway was opened? A. Consequently, so far as the competition of the new electric surface lines were concerned, the low point on the Grand Central spur

5531 was reached in 1900—that is, according to the figures I have here.

Q. The figures I have here show that is practically so? A. Then we are agreed that the effect of the electrification of the surface lines was perhaps working in with a number of other factors that we are not prepared here to discuss this afternoon, because we do not know them; but undoubtedly, as the effect of that competition, there was that gradual decrease in traffic from 1890 to 1900. Then, from 1900—

Q. Decrease of 200,000? A. 2,052,319. 1891 and

5532 1892 may have been still larger.

Q. Then it fell off to about 1,400,000? A. Yes, about that. Then, after that it increased very rapidly and in 1904 it reached 2,273,486. Now, there were two factors there. One of them was undoubtedly the wearing away of this competition, of the new electrified surface lines with the elevated; the other one was the electrification of the elevated itself, which provided a new and much superior facility, which worked to take away traffic from the surface lines. Then, of course, thereafter there came along a still superior facility, the new subway, and then all of these

gains of a few years, were lost, and a still larger sum was lost. 5533

Q. Now, going back to where I started from, trying to bring out the first competition from the electrification of the surface railroads, that brought down the traffic some 600,000 or 700,000, was that right—about one-third? A. Yes, over a period of years, and apparently the competition worked this way: that the traffic on the spur continued to go down right along, that is it did not work itself out. The competition did not complete itself in one, two, or three years; the traffic continued to decline on 5534
the spur, apparently, from these figures, until the electrification of the elevated lines took place. Now, may I apply that to the present situation?

Q. Wait a moment. I am trying to ask you some questions? A. That, sometimes, is not noticeable.

Q. Not if you talk all the time and do not respond to my questions. I am going to ask you if you know of any other reason, except the electrification of the surface lines, why, during that period of decreasing traffic on the spur—whether you know of any other cause than the one I have 5535
stated to be the one? A. No, I do not; but I have not made any intensive study of that entire period, as to what factors may have come in there. My guess would be that that is the chief factor, but there may have been other important factors that would have to be gone into if we are going to analyze this thing. That is probably the important factor.

Q. And you have not analyzed it, and you do not consider it significant, as to what is to be the future use of the spur? A. I do not think anybody ever understood that; certainly I did not. I have said

5536 that I have not analyzed the other factors that may have come in, that I want to analyze very carefully and draw a reasonable conclusion.

Q. Then the traffic went up again before the subway was opened to the highest point that it ever reached; is that true? A. That is correct.

Q. And that increase was, from whatever reason it may have been, very rapid? A. It was very rapid.

Q. Then there came the next competition with the subway through the opening of the original 5537 subway in October 27, 1904, and following that there was a long period of decline, was there not? I see you refer to it as a long period. A. Of decline.

Q. Yes. A. Well, no, there was a very rapid decline, and then there were several years afterwards, without any noticeable significant increase in traffic. That is, the minimum was reached in 1906, slightly under a million.

Q. What was your figure for the fiscal year 1906? A. 996,325, or practically one million. Now, the figures continue fairly close to that point. They 5538 went up to 1,214,000 in 1910, but went back to—well, in 1913 they were only 1,053,740; so the real increase did not begin until after 1913.

Q. All right. Then we are agreed that after this second source of competition and decline, there was another serious decline, in this case cutting the traffic in two and lasting in its effects for quite a number of years? A. Ten years, as it works from figures I have; that is, the losses sustained continue practically for ten years, and after ten years there began to be a fairly rapid increase again in the spur sales.

Q. I do not want to get into a discussion of par-

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ticular years, because my figures are for calendar years and yours are for fiscal years? A. It is roughly a ten-year period.

Q. According to mine, it is a seven-year period and according to yours it seems to be a ten-year period. What are your figures for 1904? A. 2,273,486, dropping to 1,500,000 the next year, the minimum in 1906. Then that minimum was practically held until the close of 1913 and then after that there is a fairly rapid increase.

Q. I just asked you for one year. What was your figure for 1912, for instance? A. 1,059,957.

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Q. And what was your figure for the following year? A. 1,053,740.

Q. That was 1913? A. Correct.

Q. And for 1914? A. 1,281,111.

Q. So there is where the rise began? A. Yes, the rise began there.

Q. Which was nine years? A. Nine years—well, it was for 1904, when the subway went in, to 1914, when the increase began—nine to ten years.

Q. And then, when the Lexington Avenue subway was opened on August 17, 1918, the last year, your fiscal year, before the third source of competition came in, would be 1917. What is the traffic count? A. 1,862,464.

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Q. An increase of over 80 per cent. in that period following 1913; that is four or five years? A. Yes, that is true; an increase of 80 per cent. took place during that period.

Q. In three or four years? A. Yes, sir.

Q. Following the opening—? A. No.

Q. No, preceding the opening of the Lexington Avenue subway? A. That is correct.

Q. Now comes along the third source of competition, the Lexington Avenue subway, opened

5542 August 17, 1918, and there has been a decrease, due to that, of about 320,000 or 350,000? A. About that.

Q. Now, we come down to the point where we have reached the turning point and started on one of those rapid increases again. What do you think about that? A. Why, using the earlier experience, it would seem not. That is to say, after the original subway, it took nine to ten years before the upward trend started, and the traffic began to increase to a considerable extent on that spur. If
5543 we use that as a basis of comparison, we would still have about seven years to go before we could expect anything like a rapid increase.

Q. Now, if it should appear that that increase has already started in, that before the present calendar year, 1920, the traffic had already begun to increase and did increase over the traffic of the year preceding, would you conclude that the corner had been turned and another period of rapid increase had started in? A. Oh, no. Really, you cannot use the increase of a short period and lead to any such monumental conclusion. There are fluctuations. Now, going back to the earlier pe-
5544 riod. You find that in 1910 the traffic went up to 2,214,000, and dropped back to 2,060,000, and continued on that basis for several years. There are minor fluctuations, due to minor causes that you cannot determine. A six months' period does not show anything of that sort.

Q. Did you ever study a chart showing the trend upward and every decrease; have you ever done that? A. Yes, I have that memorandum of yours you are referring to.

Q. Would it interest you to know that every one of the elevated lines had a decrease, due to

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the panic in 1907 and the year's depression that followed? A. Yes, but the ticket sales here at Grand Central station did not show any such fluctuation for 1907 and 1908. Then, in 1910, there was a temporary high point reached and again a decline until after 1913. So you see that does not—

Q. But in 1910 and 1911, for the Third, Sixth and Second Avenues, all of them stopped going up? A. But we are talking here about the Grand Central station and what happened there.

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Q. I know, but if there was no rapid transit change in 1910, and if you find, in a chart based upon actual figures—? A. In 1910?

Q. Yes. A. No, curiously enough, 1910 was the biggest figure on the spur.

Q. But you are running by fiscal years and my figures here are calendar years, so we might differ? A. But either direction from that point, excluding my fiscal year of 1910, which was a temporary high point, those figures ran just about even for three years in either way. So that as to these figures, your tabulations and mine cannot vary greatly; so that the result of all of that is, if you are going

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to use the experience subsequent to the opening of the old subway as indicating what is going to happen now, it would look as if we would have probably a period of six, seven or eight years at the Grand Central, before the traffic would begin again significantly to increase. That is what those figures show, if you make that comparison.

Q. So you mean that you would expect from—? A. Oh, no, I am not saying that. I have said several times that those factors I have not studied sufficiently to furnish a satisfactory conclusion my-

self; but if you take that historical comparison you mentioned, the conclusion is there.

Mr. Nichols: I do not want to go into this at too great length, if you will just confine yourself to specific replies.

Commissioner Barrett: There has been a lot of speech-making here. Try to answer yes or no as near as you can.

Mr. Nichols: That is what I would like.

Q. Then, Mr. Bauer, do you see in anything that you have gathered as to the increases that have
5519 followed the working out of your computations in the past, that the elevated line—do you see any reason why there should not be a similar increase of traffic at the present time now on the elevated line? A. On that spur?

Q. Yes. A. From the figures I have gathered I see no reason to expect any considerable increase in traffic on that spur for seven years to come.

Q. Several years? A. Just about six or seven.

Q. Do you know that the traffic in the 42nd Street district is increasing with very great rapidity and volume at the present time? A. At what point, the elevated or the subway?

5520 Q. At all points? A. The statement I present here—

Q. I said at all points and I asked you whether it was increasing greatly at the present time. That calls merely for yes or no? A. The information I have here does not indicate it.

Q. You say no? That is right? A. Well—

Mr. Nichols: That is all. I do not want to ask any more questions.

Redirect examination by Mr. Devery:

Q. You were going to tell us about that letter

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Mr. Nichols referred to as showing at least a 15 per cent. greater traffic than was indicated by the ticket sales? A. Yes.

Q. What letter is that? A. It is a letter of May 10, 1920 to Hon. Henry R. Curran, President of the Borough of Manhattan, from the President of the Manhattan Railway Company, Alfred Skitt.

Q. That is a statement made by the company? A. Yes.

Q. You did not investigate as to the truth of the statement? A. No, I did not check the figures. I tried to get an explanation of some of the state-

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ments made.

Q. What was the explanation given you?

Mr. Nichols: I do not see any use of going into these explanations. I merely brought out here as to whether he knew, as a fact, the statement had been made and whether or not he had taken the trouble to investigate it since.

By Commissioner Barrett:

Q. You took that letter to the Interborough, as I understand it? A. I did.

Q. And you wanted an explanation of the figures? A. Yes.

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Q. Did they give you an explanation of the figures? A. Some explanation.

Q. Tell us what they said?

By Mr. Devery:

Q. Give us your best recollection of it. A. It is somewhat difficult, right off, to go into the thing.

By Commissioner Barrett:

Q. That is all right. You called upon them and you showed them the letter? A. I did.

Q. And they said something to you? A. Yes.

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Q. What did they say? A. I am trying to recall now, so as to give a clear explanation.

By Mr. Devery:

Q. Possibly it might aid to recall what Mr. Bruce said? A. I have the general situation in mind but these figures are technical things and it takes time to piece out in your mind just how they run into each other. I would prefer, if I could, to have a few minutes to think it over.

By Mr. Nichols:

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Q. You stated, didn't you, that Mr. Bruce agreed with your explanation. Did you know what your explanation was when you made that statement under oath? A. He agreed with the assumption.

Q. That you made as to the inaccuracy— A. As to the inaccuracy of this conclusion. Yes, that is correct.

Q. You said that about Mr. Bruce? A. Now, these figures are technical matters, and it is difficult to recall just how those things piece out, and in answering specifically I want to be sure I do state it correctly.

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Mr. Devery: Suppose you give him fifteen or twenty minutes to collect his thoughts.

Commissioner Barrett: It is very near time when I am going to adjourn this hearing. I understood you wanted two days.

Mr. Nichols: We are just starting in to prove these traffic facts. But when the statement is made that our people agree with the deductions of the witness, I want to know what they are.

Commissioner Barrett: Will you be in a position at the next hearing to go ahead on that particular point? Have you anything else?

Mr. Devery: I think not.

Mr. Nichols: No, that is all.

New York City, March 31, 1921.

Met pursuant to adjournment in the Hearing Room, Public Service Commission, 1st District, No. 49 Lafayette Street, New York City, at 2:30 P. M.

Before—Hon. Alfred M. Barrett, Commissioner, Public Service Commission, 1st District.

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Appearances: Terence Farley, Esq., Counsel for the Public Service Commission, 1st District, and H. M. Chamberlain, Esq., Assistant Counsel. John P. O'Brien, Esq., Corporation Counsel for the City of New York, by Mr. Devery, Assistant Corporation Counsel. J. O. Nichols, Esq., Counsel for the Manhattan Railway Company, Arthur G. Peacock, Esq., Counsel for the Interborough Rapid Transit Company. E. W. Forrest, Esq., Secretary of the 42nd Street Property Owners & Merchants Association.

Mr. Devery: Mr. Bauer has recalled the details of that letter, and wants to tell us about them. 5559

JOHN BAUER, appearing as a witness in behalf of the applicant, having been previously sworn in this proceeding, further testified as follows:

Redirect examination by Mr. Devery:

Q. Mr. Bauer, will you explain the conversation that you had with Mr. Bruce at the Interborough office recently with regard to the difference between the sales of tickets at the Grand Central station and the number of passengers that went through that station? A. Yes. This had to do

5560 with a statement in President Skitt's letter of May 10, 1920. In this letter there was given, first figures of annual ticket sales at Grand Central on the spur for a series of years. For 1919 the number was 1,681,817, and then followed this letter:

"In addition to the number of passengers paying fare at the Grand Central station of the 42nd Street spur during the year 1919, as above shown, there should be added the additional passengers using the eastbound trains who dropped tickets in the cancelling box, which is found to be 15 per
5561 cent. of the number of tickets sold at Grand Central station, according to the actual counts made on April 16th and 13th, 1920."

Now, I tried to make clear just exactly what the statement meant. I tried to get an explanation from Mr. Bruce in the Interborough's office—of course, mind you, I am not pretending now to quote accurately, but this is, in substance, what took place. My understanding of President Skitt's statement was that, on the day of the traffic counts, in addition to the number of passengers who paid the fare at the Grand Central station on entering
5562 the spur, a further number equal to 15 per cent. of tickets sold at the Grand Central did not pay there, but, instead, deposited tickets which had been purchased previously, either at the Grand Central or elsewhere. According to this view, the total eastbound traffic on the spur on the days of the count was the number of passengers paying their fare at the Grand Central station plus 15 per cent. of the number of tickets sold at the Grand Central. This understanding of the statement was confirmed by Mr. Bruce as probably correct, although apparently he was only trying to make the best possible guess, as I was. Then, on the basis of

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this explanation, I stated that the additional tickets sold to but not then used by the passengers paying their fare on the days of the count, would on the average about equal the number of tickets deposited by passengers who did not pay their fare directly on entering the spur. Again this view was approved by Mr. Bruce as probably correct, and if this view is to be taken as approximately correct, then the conclusion that was stated would be erroneous; but apparently, from statements that had been furnished here yesterday, or since this conversation took place, this whole understanding was wrong, and according to the figures of counts that were taken on the special days—the few days brought out—there seemed to be the belief that the total number of passengers who entered the spur were 15 per cent. in excess of the number of tickets sold.

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Mr. Devery: That is all.

Recross examination by Mr. Nichols:

Q. Mr. Bauer, yesterday, on your direct you stated that, in the discussion of this fact, the 15 per cent. more passengers entering the station then purchased tickets, that you presented a view, as you call it, in respect to that fact which differed from that of the Manhattan people, and that Bruce accepted your view. Now, is that it; is it not correct? A. Now, Mr. Commissioner, if I may, off the record—

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Commissioner Barrett: Yes.

(The further statement of the witness was not reported by the stenographer.)

By Commissioner Barrett:

Q. Answer the question yes or no. A. That question cannot be answered yes or no.

5566 *Claimants' Exhibits.*

By Mr. Nichols:

Q. Did you have a different view? If so, what was it? A. No, I did not have a different view.

Mr. Nichols: That is all.

* * * * * * *

New York City, April 8, 1921.

Met pursuant to adjournment in the Hearing Room, Public Service Commission, 1st District, No. 49 Lafayette Street, New York City, at 2:30 o'clock
5567 P. M.

Before: Hon. Alfred M. Barrett, Commissioner, Public Service Commission, 1st District.

Appearances: Terence Farley, Esq., Counsel, Public Service Commission, 1st District. H. M. Chamberlain, Esq., Assistant Counsel. John P. O'Brien, Esq., Corporation Counsel for the City of New York, By Mr. Devery, Assistant Corporation Counsel. J. O. Nichols, Esq., and Arthur G. Peacock, Esq., Counsel for the Interborough Rapid Transit Company.

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JOHN BAUER, a witness appearing in behalf of the petitioner, being first duly sworn, further testified as follows:

Redirect examination by Mr. Devery:

Q. Mr. Bauer, at some previous hearing you testified as to the relative cost of maintaining this spur? You testified as to the cost; you made certain estimates? A. Yes, sir.

Q. That was, wherever you testified, as to the profit or loss resulting from the operation? A. Yes, I made certain computations.

Q. And that was based to some extent on the

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tabulation made by the Borough President showing the distance travelled by the passenger on the 3rd Avenue line and on the spur? A. Yes, sir.

Q. And on the basis of that proportion the nickel was apportioned and you used that proportion in your estimate? A. The proportion I used was based on the result.

Q. What was the actual proportion of the nickel? It was 97½ and 2½? A. In one of my computations I apportioned 97 per cent. of the nickel to the 3rd Avenue and 3 per cent. to the spur, but if I remember correctly—

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Q. The actual average was—? A. The actual average was a little less than that—was about 2½ per cent. to the spur and 97½ per cent.—

Q. That is what I say. Now, you examined these tabulations made from Mr. Nichols' count of the passengers? A. Yes, hurriedly.

Q. You find that they are practically as made by the Borough President? A. Yes.

Q. As to the proportion of the nickel which should be attributed to the 3rd Avenue line and the proportion to the spur? A. That isn't a great discrepancy. I find that on the average, for the

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two computations that were put in, based on Mr. Nichols' figures, that 96 per cent. of the nickel would go to the 3rd Avenue and about 4 per cent. to the spur, whereas I used in the first part of my computation 3 per cent. for the spur and 97 per cent. for the 3rd Avenue. I should say that is a slight relative discrepancy, particularly when in my second computation I allocated 10 per cent. of the nickel to the spur, so I think I certainly more than allowed—

Q. On the basis of 10 per cent. allocated to the

5572 spur, you found that they were operating at a loss of something like $26,000? A. That is correct.

Q. Now, Mr. Bauer, you made some further tabulations of the tickets sold from the various stations at 42nd Street to the spur, the 6th Avenue L, the 3rd Avenue L, the 2nd Avenue L, Grand Central subway, the Times Square Subway of the I. R. T. and the Times Square subway of the B. R. T.? A. I have.

Q. Have you made those tabulations for the years 1900 to 1920, inclusive? A. Correct.

5573 Q. Except in the case of the Lexington Avenue subway and the Times Square subway stations?

Commissioner Barrett: Are you going to ask an adjournment of this case?

Mr. Nichols: You have got some more testimony?

Mr. Devery: I have got a little more.

Commissioner Barrett: I mean to say, are you both ready to close the case today?

Mr. Nichols: Except that little question of cost of operation. I think under the circumstances I had better put in some little evidence.

5574 Commissioner Barrett: When we adjourn it, to what date would you like to adjourn? We are making up our calendar now.

(Discussion off the record.)

By Mr. Devery:

Q. Have you tabulated that account of schedules made? You got these figures from the record of the Public Service Commission? A. In part from the records of the Public Service Commission and in part from the Interborough Rapid Transit Company. That is for the earlier years.

Q. Do they show fiscal years? A. Fiscal years.

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Q. Is this a copy of the tabulation that you made? A. Yes, sir.

Mr. Devery: I offer that in evidence.

(Paper received in evidence and marked Exhibit No. 4 of this date.)

Q. According to this tabulation, the ticket sales on the Grand Central spur in 1900 were 1,413,052; in 1920, 1,525,427? A. That is right.

Q. On the 6th Avenue line, the ticket sales in 1900 were 3,137,827; and in 1920 they had increased to 6,361,480? A. That is right.

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Q. On the 3rd Avenue line, 1900, the ticket sales were 1,244,178; and in 1920 they had increased to 3,339,140? A. Yes.

Q. On the 2nd Avenue line the ticket sales were 486,916, increasing in 1920 to, 1,904,200? A. Yes, sir.

Q. Grand Central subway station was built in 1905, was it? A. Yes, sir; in October—during that fiscal year.

Q. There was sold in 1905, 5,121,966 tickets and in 1920 it had increased to 28,030,334 tickets? A. Yes, sir.

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Q. The I. R. T. subway, the ticket sales at Times Square in 1905 were 3,641,345; and in 1920 26,631,180? A. Yes, sir.

Q. Now, the Times Square, B. R. T. subway, which opened in 1918, the ticket sales in 1918 were 2,258,713 and in 1920 12,318,014? Now, have you made comparisons by five year periods of the relative number of tickets sold at all of these stations? A. I have.

Q. Give us the comparisons that you have made? A. I found that on all of the stations at 42nd Street, comprehended in this total, in 1900 there were sold

5578 1,868,921 tickets, whereas on the Grand Central elevated spur there were 1,413,052.

Q. What percentage of that did the spur constitute of the sales of tickets? 1,413,052, what percentage of the total did that constitute? A. The spur had for that year 29 per cent. of the traffic of those other stations.

Q. Now, in 1905? A. In 1905 the sales on the other stations had increased to 15,350,822, or 216 per cent.; whereas, on the elevated spur there were 1,581,802 or an increase of 12 per cent. In 1910,
5579 on the other stations, the total sales had advanced to 32,397,166, or 11 per cent. during that 5-year period; on the spur, the number declined to 1,214,-089, or a decrease of 23 per cent. during the five years. During the next five years, the other stations increased to 41,795,014, or 29 per cent. for the five years; the spur increased during that five-year period 11 per cent. Up to 1920, the other stations increased to 78,644,637.

Q. 78,644,637? A. Yes, or 89 per cent. for the five years. The spur increased to 1,525,427, or 13 per cent. Now, taking the whole period from 1900 to 1920, inclusive, the sales on all of the spur sta-
5580 tions increased from 4,868,921 to 76,644,367, or 1,515 per cent. On the spur, the sales increased from 1,413,052 to 1,525,427, or 8 per cent. On all of the other stations included in the vicinity of 42nd Street the increase was 1,515 per cent., compared with 8 per cent. increase on the spur.

Q. That is the difference between 1900 and 1920? A. Correct, in terms of percentages. The spur traffic was 29 per cent. in 1900 compared with the other stations; that percentage decreased to 10 in 1905, 4 in 1910, 3 in 1915 and 2 per cent. in 1920.

Q. That is, in 1920 the spur was only carrying

only 2 per cent. of all the passengers carried from 42nd Street on all of the lines? A. Yes, sir. 5581

Q. In 1920 they were carrying 20 per cent. of all the traffic? A. Yes, that is 29 per cent. compared with all the traffic on those other stations?

Q. Well, now, Mr. Bauer, Mr. Reeves testified the other day that the corner had been turned; in other words, that the traffic on the spur, after having declined since the operation of the Lexington Avenue subway, was now on the upward trend. He based that on the last six months of 1920. Now, you made some further investigation 5582
to find out whether that increase has been continued? A. Yes, sir; I have.

Q. What have you found? A. I find that for January, 1920, there was an increase—there was a further increase over January, 1919, to 2,180, but then in February, 1921, there was a decrease, compared with 1920, amounting to 16,900, and in March, 1921, there was a decrease, compared with March, 1920, amounting to 9,780. Taking then the entire fiscal year, up to March 31, 1921, there was a decrease this year amounting to 12,847, corresponding with the same period for the preceding 5583
fiscal year.

Q. So it does not look as though the corner has been turned? A. Apparently not.

Mr. Devery: I think that is all, Mr. Bauer.

Recross examination by Mr. Nichols:

Q. Do you expect to find in March, 1920, a favorable comparison with March, 1919, Mr. Bauer? A. I was not looking for expectations. I got the figures.

Q. Well, you were not looking for expectations. Are you familiar with the comparisons between

5584 the establishment of the subway and elevated lines, between March, 1919, and 1920? Have you familiarized yourself with that in a general way, or made any study that would enable you to know anything peculiar about that comparison? A. No, I made just these comparisons.

Q. And you were not looking for anything. Now, did anybody ever call your attention, as a traffic expert or statistician, to the traffic on the surface lines in March, 1919, as affecting the whole situation in the city of New York very seriously? A.
5585 I do not believe that the March figures for any operation have been made public. I got these figures only by going to the office of the Interborough Rapid Transit.

Q. Well, we have the figures of the surface travel there too, did we not? A. No, sir.

Q. Don't you know that on the 4th of February, 1919, there occurred the first of a series of extraordinary storms, marking the most inclement weather that we have had in more than a generation? A. We are not talking about February, 1919.

Q. Comparing that with February, 1920, are you not? A. I was not, no, sir.

5586 Q. What? A. No, sir.

Q. Oh, February, 1920 and February, 1921. I mean February, 1920, that is right. But whatever it was, it was the first of the two years that you compared. Now, you remember that cold winter, don't you? A. I remember that some time back there was some cold winter. I don't know which one you mean.

Q. Don't you know that the street car lines of New York City were absolutely tied up, and not moving, and that the traffic from the street surface railways in the month of February went to the

elevated and subway lines and caused a large and abnormal increase—very striking? A. In what particular?

Q. That was in 1920, last year? A. Yes, I have, generally speaking, such a remembrance.

Q. Don't you know that throughout that month and for the month of March, it was out of all normal basis of comparison—the traffic for those two months? A. I don't think so for the spur. Of course, I admit, I have made no detail study.

Q. Now, don't you know that the traffic statistics for the elevated and subway lines, for this year 5588
1921, in the month of March, for instance, show a very striking and extraordinary falling off? A. Now, Mr. Nichols, if you want me to enter into an argument, with possibilities and probabilities, I have got to do it.

Q. This is not a question of probability or possibility. It is a question of fact? A. I presented all of the facts that were definitely available.

Q. The fact is, to anybody who knows anything about the transportation of this city, the comparison that involves the month of March and the month of February in 1920—those are the par- 5589
ticular months the surface roads were practically out of business, and that that traffic was thrown onto the elevated and onto the subway, causing a very abnormal condition. Don't you know that?

Mr. Devery: Which month?

Mr. Nichols: Beginning in February and extending well into and practically through March, the surface lines were put out of business.

Mr. Devery: You were out of business for about two weeks.

Mr. Nichols: Well, it took them some time to recover from that. That was a very serious series of storms.

5590 A. If you wish, I will say this: that during the second half of the last fiscal year ended June 30, 1920, there was an extensive traffic development all over the city, and the high records for that fiscal year were due to a large extent to the great development of that six months. Now, considering in view of that fact, I should expect that for the rest of this year the spur traffic would show a decrease, compared with the corresponding months of last year, though of course that is problematical. That is my expectation, on the basis of my general
5591 knowledge of traffic development in the city.

Q. Then you think that the whole year of 1920 was an abnormal year, not merely these months of storm? A. Well, the fiscal year 1920 marked a very rapid traffic development.

Q. Do you consider the year 1920 abnormal or otherwise? A. Abnormal, especially in the second six months. Consequently that would indicate that the last six months of this year would probably not come up to the last six months of a year ago; but that is all theory. The facts I have stated.

Q. Then to compare the traffic of a year ago
5592 which was an abnormal year, due to unusual business prosperity or something of that kind, you would not expect the traffic decrease would necessarily show anything fundamental, would you? A. Well, all I am presenting here is to show figures that are to the contrary of your positive claims that the corner, so to speak, has been turned.

Q. Mr. Reeves was pretty careful to state that he was not at all sure that the corner was turned. I think you will recall he said—he indicates we have got down and are at the bottom. At any rate, the effect of the competition of the Lexington Avenue subway had evidently pretty completely,

if not entirely, ran its course, and he did not definitely state he was sure whether or not he had turned the corner? A. I think the record would show you got him to admit it looks like as if the corner had been turned.

Q. It does, and the picking out of one month like March, and comparing it with the year before, when storms on the surface lines forced the surface traffic to the elevated lines, that shows just that month and the next month, too, and March, these decreases would be expected by anybody at all familiar at all with the situation, and the Commissioner undoubtedly observed that in his comparisons. 5594

Mr. Devery: The Commission will also, I think, take the fiscal year up to the end of March and compare that with the fiscal year for the previous year, and will find that there was a decrease of 12,000. We are taking the fiscal year as a whole, so far as we can get it. If the decrease in February and March were abnormal, so may have been the increase which my friend refers to in November and December. We simply gave the figures as they were, that is all. 5595

The Witness: Mr. Devery, may I simply state that I don't wish to argue about these figures; that there is a continuous decrease; all of these are merely presented to make it clear that there is no merit in the claim or in the suggestion made to the Commission that the corner had been turned.

Q. Now, on that point, when the first subway was built, the traffic was cut in two, was it not? A. Yes, sir.

Q. About 2,000,000 to 1,000,000. Now, when the second subway was built, the Lexington Avenue, which runs parallel with the 3d Avenue, there was

5596 a drop from 1,800,000 odd to 1,400,000. That came in about two years, did it not, 1918 to 1920? A. Yes.

Q. Nothing like the decrease following the completion of the first subway, but a relative decrease as far as it went for those two years. Now, for the last fifteen months and these two abnormal months, with the decrease as compared with the two abnormal months of the year before, when the traffic of the surface lines was thrown up onto the elevated? At any rate the decrease has in-

5597 creased, and the decrease for those months has now become negligible; but there was an increase in January, was there not? A. A small one.

Q. An increase in December? A. I don't know that there was.

Q. Did I give you the figures for the last six months? A. No, you have them for the six months. Nobody has presented the figures by month.

Q. Have you looked into the figures by months? A. I have not. It was your original assertion that the corner had been turned. There is nothing to your assertion, beyond what I stated; there isn't

5598 any argument in it. There is no evidence that the corner has been turned. That is all there is to this. It may be the corner will be turned during the next six months. I shouldn't be surprised if it would, but it may be.

Q. You came in here this afternoon and gave separate months, two months which were bad months, as I pointed out? A. Wait a minute. You don't know what effect the storm had on the spur traffic in those months of 1920?

Q. Well, if we find that the traffic on every elevated station on the 3d Avenue line in those particular months took an extraordinary jump in

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1920— A. You don't know that as compared with the subsequent months, February and March, 1920. My point is that the two first months of 1920 was a period of extraordinary traffic development. I would like to have you produce figures by months and you will discover that extraordinary traffic of February and March continued to be extraordinary through April, May and June. Of course, this is a general assertion, without figures.

Q. Why didn't you look up the figures by months themselves? A. Because I did not have—there was not motive enough. All that was necessary was to 5600
present what I have to say that you were talking about, compared with your corner having been turned, and there seemed to be considerable atmosphere around here that the corner might have been turned. Now, that atmosphere I want to help to dispel, and I think we have done that.

Q. They say one swallow does not make a summer. Two months out of 15, does that seem very much to you? A. Yes, and if you go back over the history of the spur, you will find out also that even six months does not constitute a corner.

Q. I don't claim that it does. A. Then your 5601
claim that you tried to present before the Commission had no merit.

Q. Well, the claim will have to rest on its merits, such as it is; but it is a very striking thing that after this extraordinary competition from the paralleling Lexington Avenue subway, the decrease that has occurred has been limited to so comparatively short a period, and is so small as compared to the decrease after the first subway was built, and that apparently we have reached the bottom. After the effective resistance of the first subway was over, then there came the in-

5602 crease up again? A. You are misrepresenting, Mr. Nichols. I want the record clear on the figures and I have the figures here.

Commissioner Barrett: Explain it afterwards. Go ahead.

Mr. Nichols: It is my turn?

Commissioner Barrett: Yes.

Q. I say after the proposition of the first subway, there was quite a long time before this much heavier decrease began to be taken up; then it was taken up; then comes along the second subway.

5603 Now, it recovered from the first. Then is it not reasonable to expect, in view of the traffic conditions that are there, and the increase in 20 years on 42nd Street of these stations of 1500 per cent., that we cannot expect, with no competition in sight at that point, that in the next eight years there is going to be a very sharp trend up past that corner? That is what I am contending for? A. Oh, it may turn.

Q. Now, have I misrepresented that statement in any way? A. Sure.

Q. What is it? A. The whole thing is misrepre-

5604 sentation.

Q. Call it argument, if you choose.

Commissioner Barrett: If you people get up this way, we will never get through.

Mr. Nichols: Exactly. Call this the summing up now, Mr. Commissioner.

The Witness: Now, Mr. Commissioner, after the opening of the original subway in the fall of 1904, the bottom was reached on the spur in two years. I have got to stand up on this.

Commissioner Barrett: Go ahead.

The Witness: Now, it has been two years now since the Lexington Avenue subway was opened,

in 1918. So far as comparing those two events are concerned, if you took into consideration the experience up to 1904, that possibly the trend—the bottom has been reached on the spur; that the traffic probably will not decline very much lower. Now, however, go back to the earlier period and you will find that after bottom is reached, there was the next year a slight change, then a drop; then a gain, just a little gain, and then a drop, and it was over—well it was about 9 years after the bottom was reached before there was any real increase on the spur. Now, arguing by analogy, if the spur now has reached bottom, it will be nine years before it will really begin to increase. There may be some few thousand—20,000 increase in one year, and a drop of a few thousand the next year, but before there will be any real increase, it will be nine years, but even then, when in the prior period there was a real increase, it followed only after the third tracking of the 3d Avenue L, putting express service in there. If you take that into consideration, you cannot reasonably expect any considerable increase in traffic again on the spur, until some such striking improvement is made in the service on the 3d Avenue L, that will draw people on the spur.

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Commissioner Barrett: Are you all in?

Mr. Devery: All in.

* * * * * * *

5608 **Stipulation as to Claimants' Exhibit "Z."**

New York Supreme Court, First Judicial District, New York County.

[SAME TITLE]

In lieu of printing Claimants' Exhibit "Z," It Is Hereby Stipulated and Agreed by and between the parties hereto, for the sole purpose of these appeals, that Claimants' Exhibit "BB" is an abstract and condensation of Claimants' Exhibit "Z" which contains in detail the items from which the summary figures set forth in Claimants' Exhibit
5609 "BB" are compiled, and that said Claimants' Exhibit "Z" is considered a part of the record on appeal herein and may be used and referred to on these appeals by any party hereto with the same force and effect as if it were physically printed in the record on appeal herein.

It Is Further Stipulated and Agreed by and between the parties hereto, for the sole purpose of these appeals, that in case of appeal by any party hereto to the Court of Appeals from the order of the Appellate Division to be made and entered herein on these appeals the said Claimants' Exhibit "Z" is to be considered a part of the record
5610 on appeal to be used in the Court of Appeals and may be used and referred to in that Court by any party hereto with the same force and effect as if the aforesaid Claimants' Exhibit "Z" were physically printed in the record on appeal to be used in the Court of Appeals.

Dated, New York, October 11, 1928.

James L. Quackenbush, Attorney for the Interborough Rapid Transit Company.

Murray, Aldrich and Roberts, Attorneys for the Manhattan Railway Company.

Stipulation as to Claimants' Exhibit Z. 5611

George Welwood Murray, Attorney for The Equitable Trust Company of New York.

Page and Page, Attorneys for the Bowman Biltmore Hotels Corporation (Hotel Commodore) *et al.*

Edmund W. Van Voorhis, Attorney for the Pershing Square Building Corporation.

Alex S. Lyman, Attorney for The New York Central Railroad Company, the New York & Harlem Railroad Company and the New York State Realty and Terminal Company.

Hollander and Bernheimer, Attorneys for 5612
Seward W. Ehrich, Inc.

Shearman and Sterling, Attorneys for Robert Walton Goelet, 145 East 41st Street Corporation, The National City Bank of New York and The National City Realty Corporation.

Midldebrook and Sincerbeaux, Attorneys for the Manhattan Storage and Warehouse Company.

Parsons, Closson and McIlvaine, Attorneys for the Cooper Union for the Advancement of Science and Art.

George P. Nicholson, Corporation Counsel, Attorney for The City of New York.

5613

Davies, Auerbach and Cornell, Attorneys for The Central Union Trust Company of New York.

5614 *Claimants' Exhibits.*

Claimants' Exhibit "BB"—Cost of Station Reconstruction, Etc.

Cost of Station Reconstruction, Structure changes and Miscellaneous work necessitated on account of the removal of the East Forty Second Street Structure.

		Cost of Labor	Cost of Material	Rent
Engineering	Chief Engr. Dept.	$4585.94		
"	F.W.G.	3073.09		923.32
Street Repair	F.McG.	590.03	462.56	
Road Engineer	D.C.W.	14073.27	14981.62	
Master Painter	J.H.P.	900.94	330.68	
" Carpenter—Man.	H.P.	10347.51	7488.37	
Telephone & Telegraph Engr.	W.H.K.	2860.25	1309.65	
Road Master	D.J.S.	1465.82	623.71	
5615 Foundations & Catch Basins..	W.C.M.	2461.26	758.28	
Track Signals	J.M.W.	42.56		
Train Operation	J.S.D.	93.39	7.67	
	Genl.	39.10	118.58	
3rd Rail & Track Cables	E.E.—Davis	10.26	1.23	
Master Carpenter—Sub.	F.W.A.		124.27	
Auto Trucks	Geis		67.43	
	Cables		832.68	
	Totals	$40453.42	27106.75	923.32

	$40453.42
	27106.75
	923.32
	$68573.49
Less Credits	467.07
	68106.42
5616 Plus Workmen's Compensation—6% on Cost of Labor—$40453.42	2432.61
	70539.03
Plus Engineering, Superintendence, Administration, Legal and all other expense not specifically allocated to this work—10%	6810.64
Total Cost	$77349.67

Construction Cost of Duct Lines, including Workmen's Compensation 6% and overhead 10%	$12503.04	
Cost of installing cables and new duct line, including Workmen's Compensation 6% and Overhead 10%	2104.06	14607.10
Construction of Stairway, N. E. Corner 42nd Street & Third Avenue. Part cost of construction directly charged to 42nd Street Spur removal plus Workmen's Compensation 6% and Overhead 10%		2838.62
		$94795.39

Claimants' Exhibit "CC"—Statement Showing Passenger Traffic by Months, 1921-1925, 42nd St. Sta., 3rd Ave. Line, Grand Central Sta. 3rd Ave. Line.

STATEMENT SHOWING PASSENGER TRAFFIC BY MONTHS

	42nd St. Station 3rd Ave. Line	Grand Central Station 3rd Ave. Line	Total	2nd Ave. Line
July 1921	273300	106720	380020	154500
Aug. "	277600	112320	389920	158310
Sept. "	288600	112360	400960	158240
Oct. "	309800	110900	420700	168580
Nov. "	286900	100720	387620	163780
Dec. "	300800	110040	410840	170360
Jan. 1922	288800	103960	392760	165800
Feb. "	262300	93620	355920	152900
Mch. "	293000	110920	403920	175560
Apr. "	293300	108440	401740	168720
May "	296300	111220	407520	176100
June "	271000	108880	379880	165160
Total	3441700	1290100	4731800	1978040
July 1922	277400	108100	385500	163000
Aug. "	284410	112040	396450	166800
Sept. "	296790	112760	409550	167120
Oct. "	319600	111740	431340	179360
Nov. "	299900	102160	402060	174260
Dec. "	303000	108340	411340	176120
Jan. 1923	297800	110360	408160	175940
Feb. "	262900	97200	360100	156600
Mch. "	310100	117920	428020	184900
Apl. "	328213	124003	452216	190057
May "	355546	127803	483349	211607
June "	348221	125957	474181	201560
Total	3683883	1358383	5042266	2147324

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5620 *Claimants' Exhibits.*

July 1923	322741	121417	444158	193688
Aug. "	331716	124055	455771	192744
Sept. "	339557	123433	462990	185056
Oct. "	376827	135594	512421	214468
Nov. "	352066	123442	475508	203876
Dec. "	431198	25243	456441	210780
Jan. 1924	428517		428517	210210
Feb. "	384811		384811	192815
Mar. "	431585		431585	215420
Apr. "	428277		428277	211676
May "	444113		444113	220144
June "	432437		432437	215953
5621 Total	4703845	653184	5357029	2466830
July 1924	425331		425331	220728
Aug. "	414960		414960	210153
Sept. "	429271		429271	214534
Oct. "	468848		468848	236441
Nov. "	417549		417549	216848
Dec. "	434882		434882	227263
Jan. 1925	431692		431692	229343
Feb. "	398165		398165	205103
Mch. "	464513		464513	227777
Apr. "	468995		468995	227212
May "	474748		474748	227151
June "	457179		457179	219733
5622 Total	5286133		5286133	2662286

Claimants' Exhibit "DD"—Statement Showing Passenger Traffic by Months, 1921-1925, 34th St. Sta., 3rd Ave. and 2nd Ave. Lines, 47th St. Sta., 3rd Ave. Line, 50th St. Sta., 2nd Ave. Line.

STATEMENT SHOWING PASSENGER TRAFFIC BY MONTHS

Month	34th St. Sta. 3rd Ave. Line	34th St. Sta. 2nd Ave. Line	47th St. Sta. 3rd Ave. Line	50th St. Sta. 2nd Ave. Line
July 1921	263,560	130,070	102,237	70,786
Aug.	269,100	134,435	103,436	72,351
Sept.	277,000	135,690	109,894	76,101
Oct.	303,740	148,010	122,523	83,023
Nov.	294,160	144,200	122,834	82,732
Dec.	309,920	147,580	123,279	86,838
Jan. 1922	292,080	142,840	118,939	82,742
Feb.	271,300	135,405	106,582	74,802
Mch.	313,680	156,650	124,186	84,501
Apr.	295,920	149,400	117,894	82,294
May	295,820	150,890	119,027	84,311
June	273,080	140,520	108,072	78,045
Total	3,459,360	1,517,690	1,378,903	958,526
July 1922	251,000	136,440	107,068	77,335
Aug.	268,200	140,420	110,680	76,593
Sept.	282,920	143,788	118,925	79,414
Oct.	307,880	155,570	137,187	89,759
Nov.	298,900	153,300	132,145	87,194
Dec.	305,160	153,280	132,585	88,325
Jan. 1923	301,880	157,640	140,790	90,175
Feb.	269,960	141,070	124,761	82,402
Mch.	330,020	169,500	139,388	96,880
Apr.	333,017	162,888	132,838	91,877
May	344,684	173,444	140,323	100,468
June	317,741	160,291	172,731	95,646
Total	3,611,362	1,847,631	1,589,421	1,056,068

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	July 1923	285,141	151,658	112,489	83,633
	Aug.	298,920	156,011	113,457	83,514
	Sept.	300,608	150,871	118,730	82,990
	Oct.	365,359	179,291	149,633	95,436
	Nov.	336,215	166,395	138,076	90,160
	Dec.	352,025	166,776	141,329	92,385
	Jan. 1921	334,202	169,088	134,460	91,832
	Feb.	308,436	161,738	124,383	84,740
	Mch.	340,304	178,738	136,947	94,680
	Apr.	339,513	172,960	139,610	93,350
	May	334,936	172,457	141,782	97,260
	June	311,594	168,280	128,635	94,690
5627	Total	3,907,253	1,994,263	1,579,531	1,084,670
	July 1924	287,864	165,549	124,042	91,020
	Aug.	284,095	159,673	118,528	89,210
	Sept.	313,030	171,896	131,795	95,780
	Oct.	349,216	191,534	154,288	104,275
	Nov.	309,913	169,986	136,136	96,627
	Dec.	334,742	174,994	135,666	99,730
	Jan. 1925	326,105	182,022	141,187	106,769
	Feb.	320,253	168,005	121,187	91,052
	Mch.	340,721	189,776	136,071	100,852
	Apr.	334,381	183,526	131,241	98,387
	May	319,372	179,977	128,551	99,224
	June	305,268	171,891	119,642	94,229
5628	Total	3,806,960	2,108,829	1,578,334	1,167,155

Stipulation as to Certain Acts of the Legislature, being City's Exhibits 6, 7 and 8 and Claimants' Exhibits "A," "B," "C" and "Q." 5629

New York Supreme Court, First Judicial District, County of New York.

[Same title]

It is hereby stipulated and agreed by and between the parties hereto for the sole purpose of these appeals that Chapter 788 of the Laws of 1917 (City's Exhibit 6), Chapter 611 of the Laws of 1919 (City's Exhibit 7), Chapter 635 of the Laws 5630
of 1923 (City's Exhibit 8), Chapter 140 of the Laws of 1850 (Claimants' Exhibit "B"), Chapter 697 of the Laws of 1866 (Claimants' Exhibits "A," "B," "C" & "Q"), Chapter 489 of the Laws 1867 (Claimants' Exhibits "A," "B," "C" & "Q") Chapter 855 of the Laws of 1868 (Claimants' Exhibits "A," "B," "C," & "Q"), Chapter 595 of the Laws of 1875 (Claimants' Exhibits "A," "B," "C," & "Q") and Chapter 606 of the Laws of 1875 (Claimants' Exhibits "A," "B," "C," and "Q") are considered a part of the record on appeal herein and may be used by and referred to on these appeals by any 5631
party hereto with the same force and effect as if the aforesaid Acts were physically printed in the record on appeal herein.

It is further stipulated and agreed by and between the parties hereto that in case of an appeal by any party hereto to the Court of Appeals from the order of the Appellate Division to be made and entered herein on these appeals that the aforesaid Acts are to be considered a part of the record on appeal to be used in the Court of Appeals and may

5632 be used and referred to in that Court by any party hereto with the same force and effect as if the aforesaid Acts were physically printed in the record on Appeal to be used in the Court of Appeals.

Dated New York August 15, 1928.

James L. Quackenbush, Attorney for the Interborough Rapid Transit Company.

Murray, Aldrich and Roberts, Attorneys for the Manhattan Railway Company.

5633 George Welwood Murray, Attorney for The Equitable Trust Company of New York.

Page and Page, Attorneys for the Bowman Biltmore Hotels Corporation (Hotel Commodore) *et al.*

Edmund W. Van Voorhis, attorney for the Pershing Square Building Corporation.

Alex S. Lyman, Attorney for The New York Central Railroad Company, the New York and Harlem Railroad Company and the New York State Realty and Terminal Company.

Hollander and Bernheimer, Attorneys for Seward W. Ehrich, Inc.

5634 Shearman and Sterling, Attorneys for Robert Walton Goelet, 145 East 41st Street Corporation, The National City Bank of New York and The National City Realty Corporation.

Middlebrook and Sincerbeaux, Attorneys for the Manhattan Storage and Warehouse Company.

Parsons, Closson and McIlvaine, Attorneys for the Cooper Union for the Advancement of Science and Art.

George P. Nicholson, Corporation Counsel, Attorney for The City of New York.

Davies, Auerbach and Cornell, Attorneys for The Central Union Trust Company of New York.

5635

Claimant's (Manhattan Railway Co.) Exhibit "AA"—Sheet of Earnings.

INTERBOROUGH RAPID TRANSIT COMPANY

For Month of June 1924.

	Current Year			Previous Year			Increase—Black Decrease—Red
	Manhattan	Subway	Total	Manhattan	Subway	Total	
Gross operating revenue	1,629,259.25	3,104,881.66	4,734,140.91	1,615,037.72	2,916,195.75	4,531,233.47	202,907.44
Operating expenses	943,125.07	1,717,961.75	2,661,086.82	969,366.04	1,764,943.60	2,734,309.64	73,222.82
Expenses to earnings	57.88%	55.33%	56.21%	60.02%	60.52%	60.34%	4.13%
Net operating revenue	686,134.18	1,386,919.91	2,073,054.09	645,671.68	1,151,252.15	1,796,923.83	276,130.26
Taxes on real estate	41,942.45	15,284.81	57,227.26	39,772.18	15,903.09	55,675.27	1,551.99
Taxes on capital and earnings	16,377.19	18,370.53	34,747.72	16,268.03	19,066.21	35,334.24	586.52
Special franchise tax	102,930.78	.....	102,930.78	113,999.26	.....	113,999.26	11,068.48
Federal Capital Stock Tax	.....	608.00	608.00	.....	685.00	685.00	77.00
Federal income tax	152,200.00	161,800.00	*314,000.00	3,000.00	1,200.00	4,200.00	309,800.00
Total Taxes	313,450.42	196,063.34	509,513.76	173,039.47	36,854.30	209,893.77	299,619.99
Income from operation	372,683.76	1,190,856.57	1,563,540.33	472,632.21	1,114,397.85	1,587,030.06	23,489.73
Non-operating income	7,723.42	34,305.27	42,028.69	10,873.22	37,051.55	47,924.77	5,896.08
Gross Income	380,407.18	1,225,161.84	1,605,569.02	483,505.43	1,151,449.40	1,634,954.83	29,385.81
Interest on bonds (rental)	150,686.66	222,238.11	372,924.77	150,686.66	214,855.40	365,542.06	7,382.71
Manhattan Dividends (rental)	523,877.00	.....	523,877.00	60,000.00	.....	60,000.00	463,877.00
Manhattan Ry. Cash Rental	4,166.66	.....	4,166.66	4,166.66	.....	4,166.66	.....
Interest on 5% bonds	120,072.73	552,401.93	672,474.66	117,263.00	552,401.94	669,664.94	2,809.72
Interest on 10 yr. 7% notes	79,956.22	107,625.00	187,581.22	76,511.77	107,625.00	184,136.77	3,444.45
Sinking fund on 5% bonds	43,845.17	137,173.74	181,018.91	42,428.85	137,173.80	179,602.65	1,416.26
Interest on 10 yr. 6% notes	3,416.35	25,363.82	28,780.17	432.66	12,816.94	13,249.60	15,530.57
Interest on equip. trust ctfs.	.....	5,600.00	5,600.00	.....	389.66	389.66	5,210.34
Int. on investment of dep. reserve	.....	4,066.66	4,066.66	.....	4,066.66	4,066.66	.....
Interest on unfunded debt	1,855.45	6,362.61	8,218.06	8,852.94	6,301.08	15,154.02	6,935.96
Other rent deductions	19,138.28	2,181.20	21,319.48	19,658.17	2,181.20	21,839.37	519.89
Total Income Deductions	947,014.52	1,063,013.07	2,010,027.59	480,000.71	1,037,811.68	1,517,812.39	492,215.20
Net Corporate Income (Exclusive of accruals under Contract 3 & related ctfs.)	566,607.34	162,148.77	404,458.57	3,504.72	113,637.72	117,142.44	521,601.01
Maintenance in excess of Contractural provisions	70,806.27	62,644.00	8,162.27	86,956.33	4,079.63	82,876.70	74,714.43
Balance after actual maintenance	637,413.61	224,792.77	412,620.84	83,451.61	117,717.35	34,265.74	446,886.58
Passengers carried	30,202,188	57,740,747	87,942,935	29,878,090	53,788,082	83,666,172	4,276,763
Trains run	99,368	115,046	214,414	100,780	114,806	215,586	1,172
Train mileage	1,086,583	1,432,282	2,518,865	1,104,111	1,410,477	2,514,588	4,277
Cars run	500,724	727,032	1,227,756	505,608	722,376	1,227,984	228
Car mileage	5,647,320	10,252,600	15,899,920	5,710,682	10,088,797	15,799,479	100,441
Average passengers per train	304	502	410	296	468	388	22
Average cars per train	5.04	6.32	5.72	5.02	6.29	5.69	.03
Daily average passengers carried	1,006,740	1,924,691	2,931,431	995,936	1,792,936	2,788,872	142,559
Daily average earnings	54,309.	103,496.	157,805.	53,835.	97,206.	151,041.	6,764.
Daily average operating expenses	31,438.	57,265.	88,703.	32,312.	58,832.	91,144.	2,441.

5636

5637

5638 *Claimants' Exhibits.*

	366 Days	For 12 Months Ended June 30th, 1924.		365 Days			
Gross operating revenue	19,381,140.44	38,392,634.61	57,773,775.05	19,215,177.44	36,344,258.46	55,559,435.90	2,214,339.15
Operating expenses	11,884,781.98	21,956,633.09	33,841,415.07	12,437,370.06	21,955,138.72	34,392,508.78	**551,093.71**
Expenses to earnings	61.32%	57.20%	58.57%	64.73%	60.41%	61.90%	**3.33%**
Net operating revenue	7,496,358.46	16,436,001.52	23,932,359.98	6,777,807.38	14,389,119.74	21,166,927.12	2,765,432.86
Taxes on real estate	494,456.23	177,857.65	672,313.88	479,204.00	193,043.56	672,247.56	66.32
Taxes on capital and earnings	194,753.58	231,064.61	425,818.19	224,558.23	235,610.56	460,168.79	**34,350.60**
Special franchise tax	1,300,857.15	.....	1,300,857.15	1,475,908.44	.....	1,475,908.44	**175,051.29**
Federal Capital Stock Tax	.....	7,296.00	7,296.00	.....	8,220.00	8,220.00	**924.00**
Federal income tax	178,200.00	179,044.45	*357,244.45	31,663.49	14,102.27	45,765.76	311,478.69
Total Taxes	2,168,266.96	595,262.71	2,763,529.67	2,211,334.16	450,976.39	2,662,310.55	101,219.12
Income from operation	5,328,091.50	15,840,738.81	21,168,830.31	4,566,473.22	13,938,143.35	18,504,616.57	2,664,213.74
5639 Non-operating income	84,270.23	318,492.42	402,762.65	80,880.72	492,969.53	573,850.25	**171,087.60**
Gross Income	5,412,361.73	16,159,231.23	21,571,592.96	4,647,353.94	14,431,112.88	19,078,466.82	2,493,126.14
Interest on bonds (rental)	1,808,240.00	2,610,999.06	4,419,239.06	1,808,240.00	2,584,034.93	4,392,274.93	26,964.13
Manhattan Dividends (rental)	2,723,877.00	.....	†2,723,877.00	1,710,000.00	.....	1,710,000.00	1,013,877.00
Manhattan Ry. Cash Rental	50,000.00	.....	50,000.00	50,000.00	.....	50,000.00	.....
Interest on 5% bonds	1,438,169.21	6,628,823.15	8,066,992.36	1,403,267.18	6,628,823.16	8,032,090.34	34,902.02
Interest on 10 yr. 7% notes	954,919.96	1,291,500.00	2,246,419.96	936,680.69	1,366,395.28	2,303,075.97	**56,656.01**
Sinking fund on 5% bonds	524,471.75	1,646,084.64	2,170,556.39	496,389.76	1,639,661.55	2,136,051.31	34,505.08
Interest on 10 yr. 6% notes	18,270.67	242,637.87	260,908.54	2,545.50	62,600.13	65,145.63	195,762.91
Interest on equip. trust ctfs	.....	70,420.00	70,420.00	.....	389.66	389.66	70,030.34
Int. on investment of dep. reserve	.....	48,800.00	48,800.00	.....	48,800.00	48,800.00	.....
Interest on unfunded debt	68,726.26	109,816.89	178,543.15	105,586.61	70,314.32	175,900.93	2,642.22
Other rent deductions	238,485.27	26,174.40	264,659.67	269,293.88	27,239.03	296,532.91	**31,873.24**
Total Income Deductions	7,825,160.12	12,675,256.01	20,500,416.13	6,782,003.62	12,428,258.06	19,210,261.68	1,290,154.45
Net Corporate Income (Exclusive of accruals under Contract 3 & related							
5640 ctfs.	**2,412,798.39**	3,483,975.22	1,071,176.83	**2,134,649.68**	2,002,854.82	**131,794.86**	1,202,971.69
Maintenance in excess of Contractural provisions	1,303,487.15	124,715.49	1,430,202.64	584,820.41	**147,622.89**	437,197.52	993,005.12
Balance after actual maintenance	**3,718,285.54**	3,359,259.73	**359,025.81**	**2,719,470.09**	2,150,477.71	**568,992.38**	209,966.57
Passengers carried	359,410,056	714,933,187	1,074,343,243	348,524,700	676,650,431	1,025,175,131	49,168,112
Train mileage	13,267,366	17,340,643	30,608,009	12,356,308	16,936,544	29,292,852	1,315,157
Car mileage	68,889,734	124,025,653	192,915,387	65,041,092	120,563,946	185,605,038	7,310,349
Daily average passengers carried	981,995	1,953,369	2,935,364	954,862	1,853,837	2,808,699	126,665
Daily average earnings	52,954.	104,898.	157,852.	52,644.	99,573.	152,217.	5,635.
Daily average operating expenses	32,472.	59,991.	92,463.	34,075.	60,151.	94,226.	1,763.

NOTE: Under the plan of Readjustment of May 1st, 1922, payments of the Sinking Fund installments due from July 1st, 1921 to and including January 1st, 1926, are postponed.

* Including $310,000.—estimated U. S. Income Tax for six (6) mos. end. June 30th 1924, under the Revenue Act of 1924.

† Including reserve to cover amount of additional dividend rental which might become payable to owners of Manhattan stock not assenting to the Plan of Readjustment, for period from July 1st 1922 to June 30th 1924.

H. P. BERRY
Comptroller

NOTE: Figures in **dark** type are red in original.

Stipulation as to Central Union Trust Co.'s Exhibits "A" and "B" and Equitable Trust Co.'s Exhibit "A." 5641

New York Supreme Court, First Judicial District, New York County.

[SAME TITLE]

In lieu of printing the Central Union Trust Company's Exhibits "A" and "B" and the Equitable Trust Company's Exhibit "A," it is hereby stipulated and agreed by and between the parties hereto for the sole purpose of these appeals that the mortgage known as the Consolidated mortgage 5642
made by the Manhattan Railway Company and the Metropolitan Elevated Railway Company to the Central Union Trust Company, as Trustee, dated February 26, 1890 and recorded in the office of the Register of the County of New York on February 26th, 1890, in Liber 2538 of Mortgages, page 157 (received in evidence and marked Central Union Trust Company's Exhibit "A" (page 1066 of the record), the Indenture supplemental to the aforesaid Consolidated mortgage made by the Manhattan Railway Company to the Central Union Trust Company, as Trustee, dated June 13, 1899 5643
and recorded in the office of the Register of the County of New York on July 12, 1899 in Block Series Liber 7 of General Mortgages, page 265 (received in evidence and marked Central Union Trust Company's Exhibit "B" (page 1067 of the record) and the second mortgage made by the Manhattan Railway Company to the Equitable Trust Company of New York, dated June 1st, 1913 and recorded in the office of the Register of the County of New York on March 2nd, 1916 in Liber 26 of General Mortgages, page 222 and also in the

Register's office of the County of Bronx on March 3rd, 1916 in Liber 1 of General Mortgages, at page 162 (received in evidence and marked Equitable Trust Company's Exhibit "A" (page 1067 of the record), being the same mortgages subject to which the award is made in the Final Decree of the Supreme Court herein (pages 30 and 31 of the record), are considered a part of the record on appeal herein and may be used and referred to on these appeals by any party hereto with the same force and effect as if the aforesaid exhibits (Central Union Trust Company's Exhibits "A" and "B" and Equitable Trust Company's Exhibit "A") were physically printed in the record on appeal herein.

It is further stipulated and agreed by and between the parties hereto for the sole purpose of these appeals that, in the event of an appeal by any party hereto to the Court of Appeals from the order of the Appellate Division to be made and entered herein on these appeals, the aforesaid exhibits (Central Union Trust Company's Exhibits "A" and "B" and Equitable Trust Company's Exhibit "A") are to be considered a part of the record on appeal to be used in the Court of Appeals and may be used and referred to in that Court by any party hereto with the same force and effect as if the same were physically printed in the record on appeal to be used in the Court of Appeals.

Dated, New York December 11, 1928.

James L. Quackenbush, Attorney for the Interborough Rapid Transit Company.

Murray, Aldrich and Roberts, Attorneys for the Manhattan Railway Company.

George Welwood Murray, Attorney for The Equitable Trust Company of New York.

Page and Page, Attorneys for the Bowman Biltmore Hotels Corporation (Hotel Commodore) et al.

Edmund W. Van Voorhis, Attorney for the Pershing Square Building Corporation.

Alex S. Lyman, Attorney for The New York Central Railroad Company, the New York & Harlem Railroad Company and the New York State Realty and Terminal Company.

Hollander and Bernheimer, Attorneys for Seward W. Ehrich, Inc.

Shearman and Sterling, Attorneys for Robert Walton Goelet, 145 East 41st Street Corporation, 5648
The National City Bank of New York and The National City Realty Corporation.

Middlebrook and Sincerbeaux, Attorneys for the Manhattan Storage and Warehouse Company.

Parsons, Closson and McIlvaine, Attorneys for the Cooper Union for the Advancement of Science and Art.

George P. Nicholson, Corporation Counsel, Attorney for The City of New York.

Davies, Auerbach and Cornell, Attorneys for The Central Union Trust Company of New York.

5649

5650 **Stipulation Consenting to Submission of Original Claimants' Exhibits (Photographs) "H-1" to "H-38," "H-42" to "H-46," "R," "R-1" to "R-13," "S," and "S-1" to "S-16" and City's Exhibits (Photographs) "46-A" to "46-P," 66, 67 and 68.**

New York Supreme Court, First Judicial District, County of New York.

[Same Title]

5651 It is hereby stipulated and agreed by and between the parties hereto for the sole purpose of these appeals that any party hereto may submit to the Appellate Division of the Supreme Court of the First Judicial Department on the argument of these appeals the original Exhibits (photographs) received in evidence herein and marked Claimants' "H-1," "H-2," "H-3," "H-4," "H-5," "H-6," "H-7," "H-8," "H-9," "H-10," "H-11," "H-12," "H-13," "H-14," "H-15," "H-16," "H-17," "H-18," "H-19," "H-20," "H-21," "H-22," "H-23," "H-24," "H-25," "H-26," "H-27," "H-28," "H-29," "H-30," "H-31," "H-32," "H-33," "H-34," "H-35," "H-36,"
5652 "H-37," "H-38," "H-42," "H-43," "H-44," "H-45" and "H-46" (printed at pages 1906 and 1908 of the record), Claimants' Exhibits "R," "R-1," "R-2," "R-3," "R-4," "R-5," "R-6," "R-7," "R-8," "R-9," "R-10," "R-11," "R-12" and "R-13" (printed at page 1928 of the record) and Claimants' Exhibits "S," "S-1," "S-2," "S-3," "S-4," "S-5," "S-6," "S-7," "S-8," "S-9," "S-10," "S-11," "S-12," "S-13," "S-14," "S-15" and "S-16" (printed at page 1930 of the record), and City's Exhibits (photographs) "46-A," "46-B," "46-C," "46-D,"

"46-E," "46-F," "46-G," "46-H," "46-I," "46-J," "46-K," "46-L," "46-M," "46-N," "46-O" and "46-P" (printed at p.1892 of the record), City's Exhibit 66 (printed at p. 1896 of the record), City's Exhibit 67 (printed at p. 1898 of the record) and City's Exhibit 68 (printed at p. 1900 of the record). 5653

It is further stipulated and agreed by and between the parties hereto for the sole purpose of these appeals that, in the event of any appeal by any party hereto to the Court of Appeals from the order of the Appellate Division to be made and entered herein on these appeals, any party 5654
hereto may submit to the Court of Appeals on the argument of the appeal or appeals in that Court the original Exhibits (photographs) received in evidence and marked Claimants' "H-1," "H-2," "H-3," "H-4," "H-5," "H-6," "H-7," "H-8," "H-9," "H-10," "H-11," "H-12," "H-13," "H-14," "H-15," "H-16," "H-17," "H-18," "H-19," "H-20," "H-21," "H-22," "H-23," "H-24," "H-25," "H-26," "H-27," "H-28," "H-29," "H-30," "H-31," "H-32," "H-33," "H-34," "H-35," "H-36," "H-37," "H-38," "H-42," "H-43," "H-44," "H-45" and "H-46" (printed at pp. 1906 and 1908 of the record), Claimants' Exhibits "R," "R-1," "R-2," "R-3," "R-4," "R-5," "R-6," "R-7," "R-8," "R-9," "R-10," "R-11," "R-12" and "R-13" (printed at p. 1928 of the record) and Claimants' Exhibits "S," "S-1," "S-2," "S-3," "S-4," "S-5," "S-6," "S-7," "S-8," "S-9," "S-10," "S-11," "S-12," "S-13," "S-14," "S-15" and "S-16" (printed at page 1930 of the record), and City's Exhibits (photographs) "46-A," "46-B," "46-C," "46-D," "46-E," "46-F," "46-G," "46-H," "46-I," "46-J," "46-K," "46-L," "46-M," "46-N," "46-O" and "46-P" (printed at page 1892 of 5655

5656 the record), City's Exhibit 66 (printed at p. 1896 of the record), City's Exhibit 67 (printed at p. 1898 of the record) and City's Exhibit 68 (printed at p. 1900 of the record).

Dated, New York, December 14, 1928.

James L. Quackenbush, Attorney for the Interborough Rapid Transit Company.

Murray, Aldrich and Roberts, Attorneys for the Manhattan Railway Company.

George Welwood Murray, Attorney for The
5657 Equitable Trust Company of New York.

Page and Page, Attorneys for the Bowman Biltmore Hotels Corporation (Hotel Commodore) *et al.*

Edmund W. Van Voorhis, Attorney for the Pershing Square Building Corporation.

Alex S. Lyman, Attorney for The New York Central Railroad Company, the New York & Harlem Railroad Company and the New York State Realty and Terminal Company.

Hollander and Bernheimer, Attorneys for Seward W. Ehrich, Inc.

Shearman and Sterling, Attorneys for Robert
5658 Walton Goelet, 145 East 41st Street Corporation, The National City Bank of New York and The National City Realty Corporation.

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Parsons, Closson and McIlvaine, Attorneys for the Cooper Union for the Advancement of Science and Art.

George P. Nicholson, Corporation Counsel, Attorney for The City of New York.

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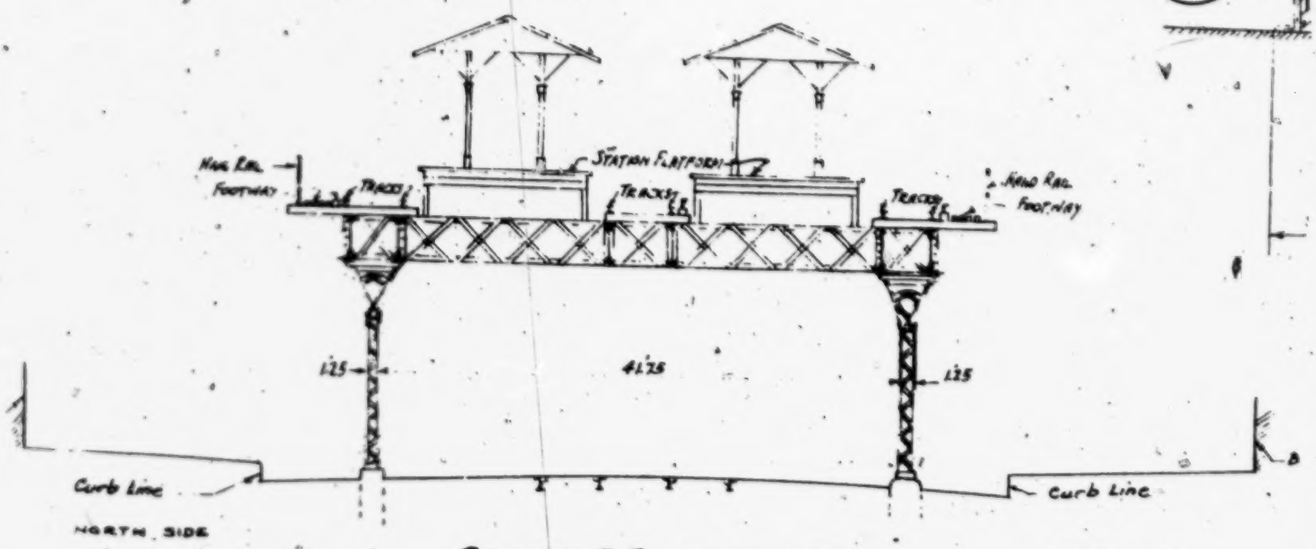
5662

5663

Damage Maps (Sheets 1, 2, 3, 4, 5, 6 and 7)—Attached to the Final Decree of the Supreme Court.

5664

DAMAGE MAP (1)



SECTION A-A - LOOKING EAST
SCALE 1" = 13.35'

Robert New Ld February 28 1928

James Olcott Cleg

JUSTICE OF THE SUPREME COURT
OF THE STATE OF NEW YORK

GRAND CENTRAL RAMP
1 STORY LIME STONE-STORES

Lot #1

BLOCK 1280

1/ Damage Map has reference to all damages shown in Damage Sheets Nos 1 to 7 inclusive and represents all property taken within the Condemnation area.

DAMAGE MAP
IN THE MATTER OF ACQUIRING TITLE TO THE
TRACKS STRUCTURE, STATION AND APPURTENANCES
OF THE
MANHATTAN RY. COMPANY
IN EAST 42nd STREET
BOROUGH OF MANHATTAN
CITY OF NEW YORK
AND ALSO THE
RIGHTS, EASEMENTS AND FRANCHISES OF SAID
MANHATTAN RY. CO TO CONSTRUCT MAINTAIN AND USE
SAID TRACKS, STRUCTURE STATIONS & APPURTENANCES

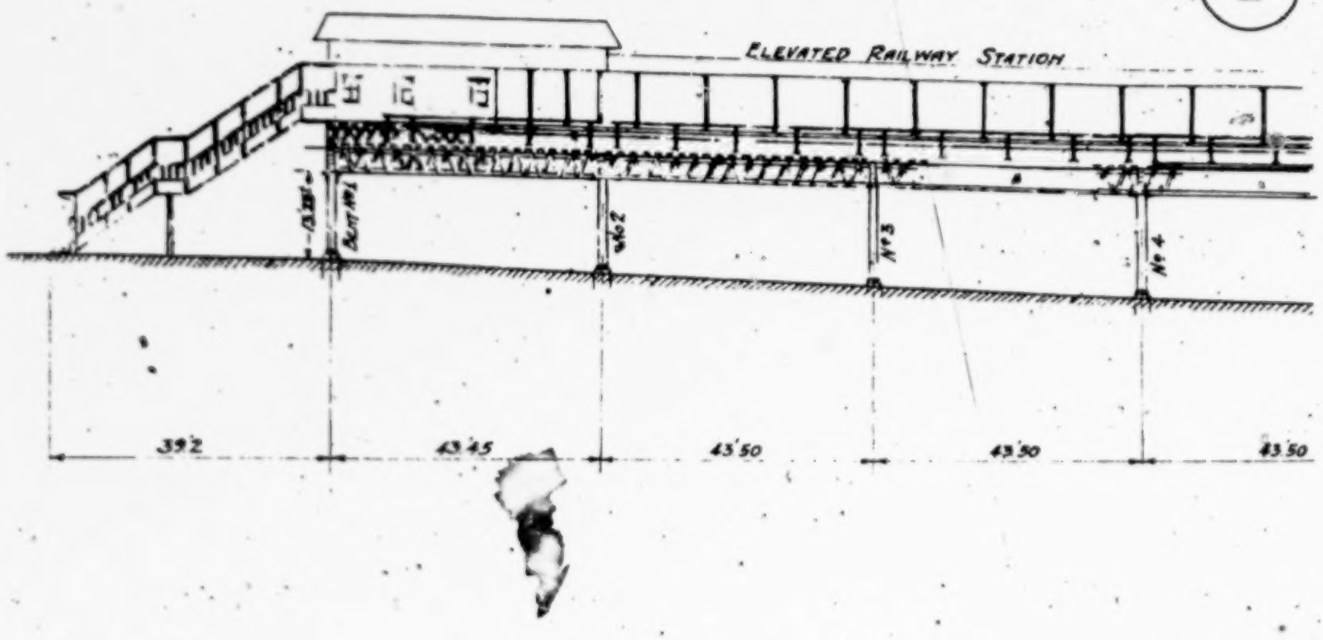
SCALE 1" = 21'6"

BUILDING LINE

CURB LINE

PARK AVE.

2



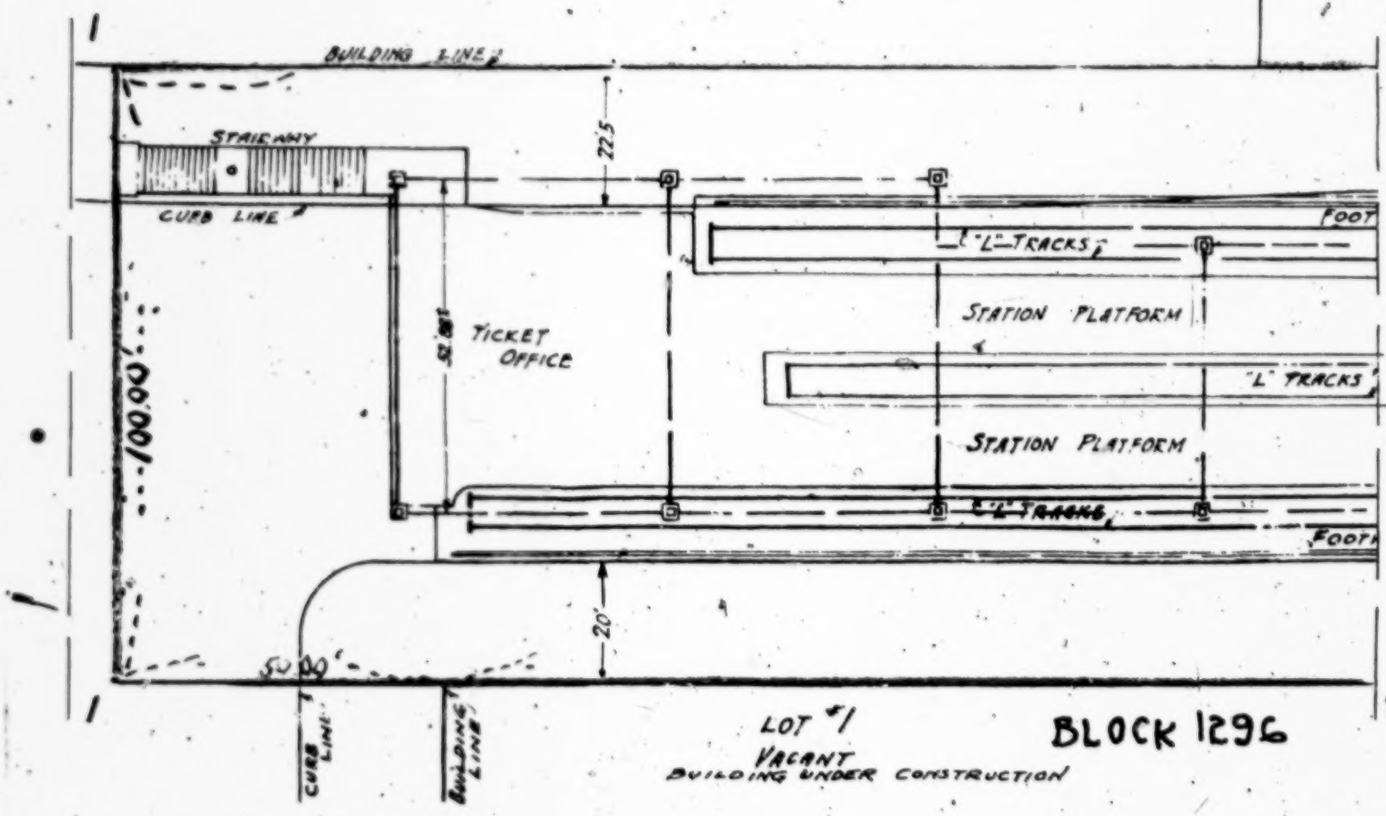
Building Line

GRAND CENTRAL RAMP
1-STORY LIME STONE - STORES

Lot #1

BLOCK 1280

28 STORY BRICK AND LIMESTONE

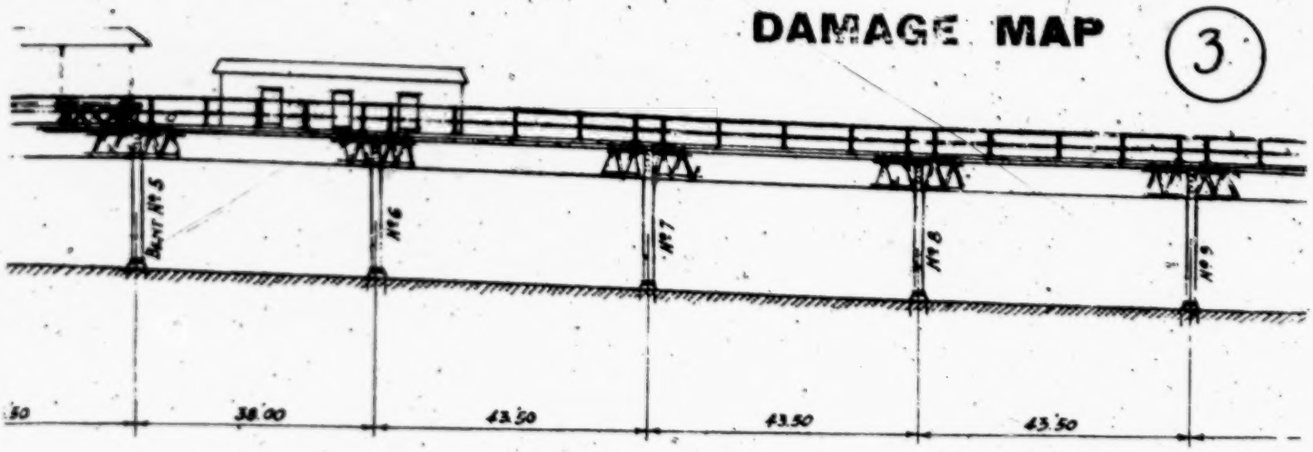


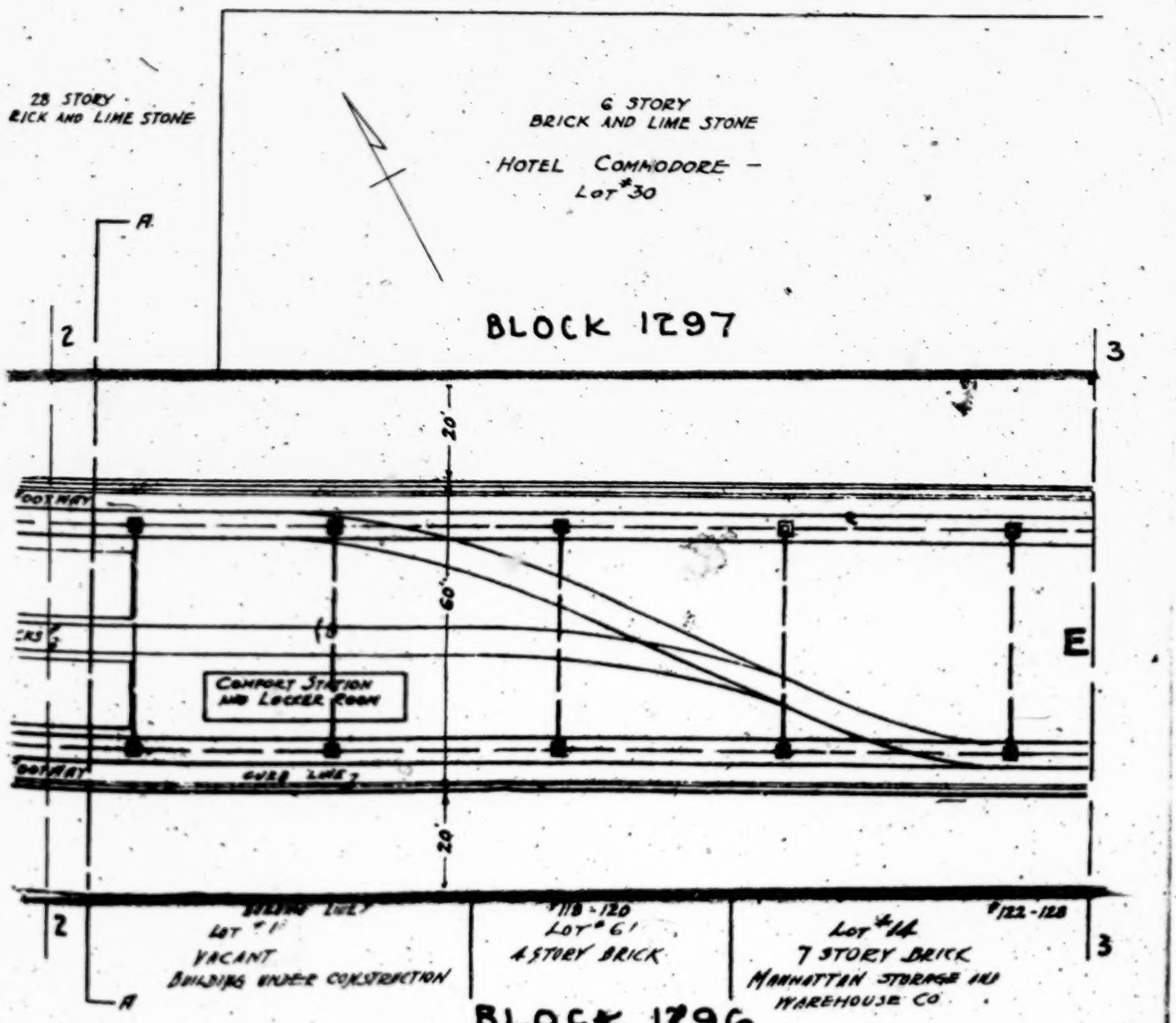
LOT #1
VACANT
BUILDING UNDER CONSTRUCTION

BLOCK 1296

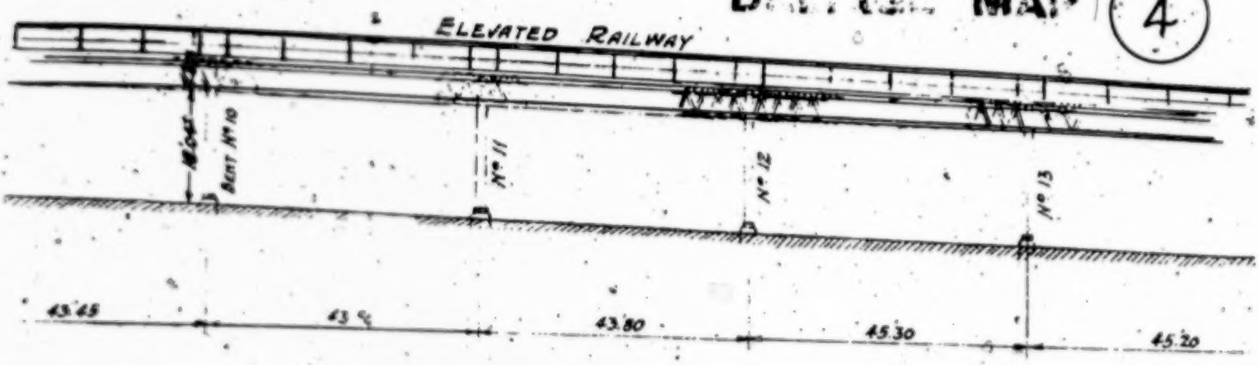
DAMAGE MAP

3

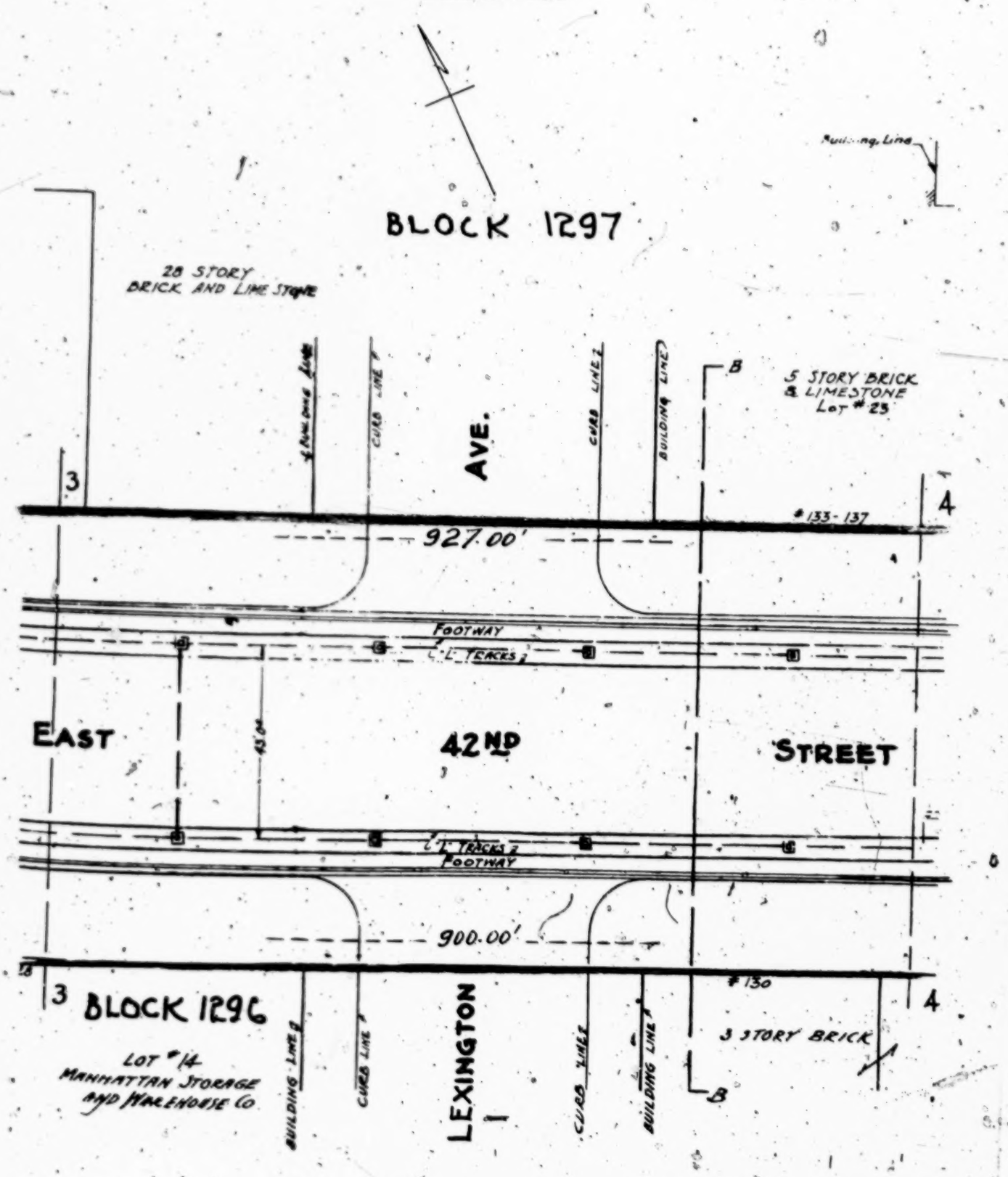

BENT No 5
No 6
No 7
No 8
No 9
50
38.00
43.50
43.50
43.50


28 STORY
BRICK AND LIME STONE
6 STORY
BRICK AND LIME STONE
HOTEL COMMODORE —
LOT #30
A
BLOCK 1297
2
3
20'
60'
20'
FOOTWAY
CURB
COMFORT STATION
AND LOCKER ROOM
E
FOOTWAY
CURB LINE
BUILDING LINE
LOT #1
VACANT
BUILDING UNDER CONSTRUCTION
#118-120
LOT #61
4 STORY BRICK
#122-128
LOT #14
7 STORY BRICK
MANHATTAN STORAGE AND
WAREHOUSE CO
2
3
A
BLOCK 1296

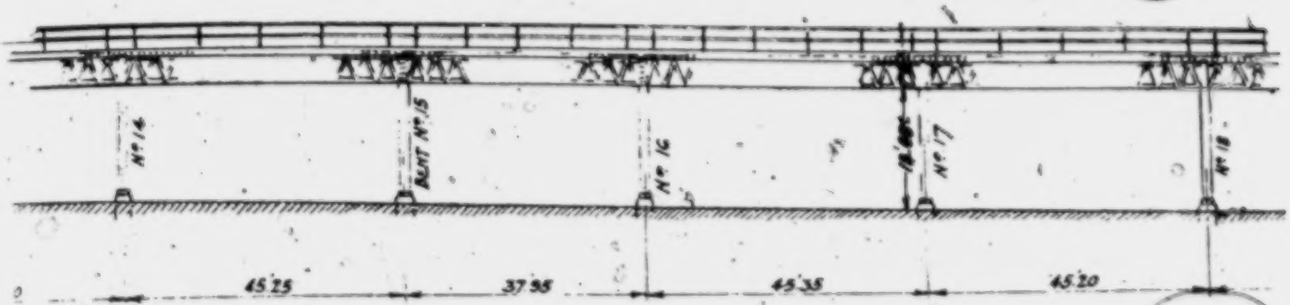
DAMAGE MAP (4)

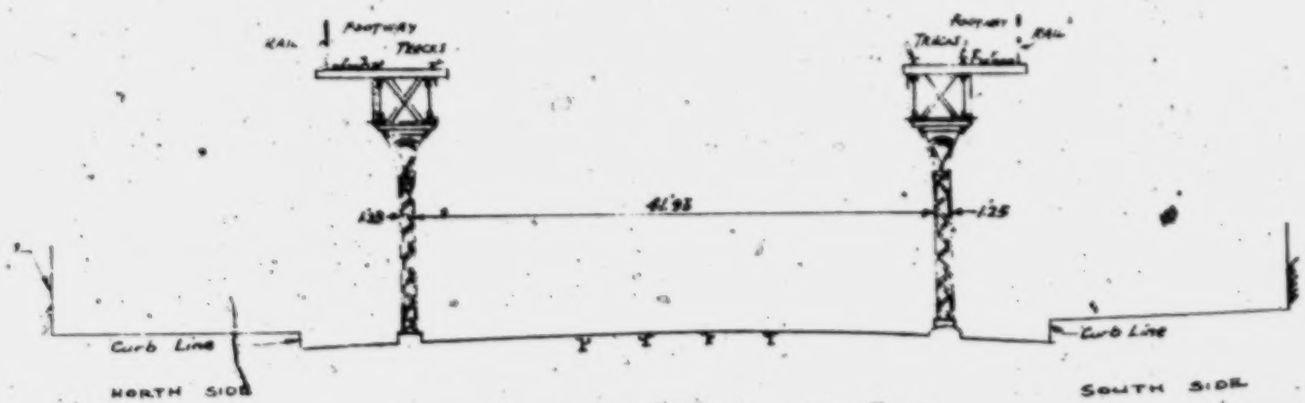


-PROFILE-
SCALE 1"=20'



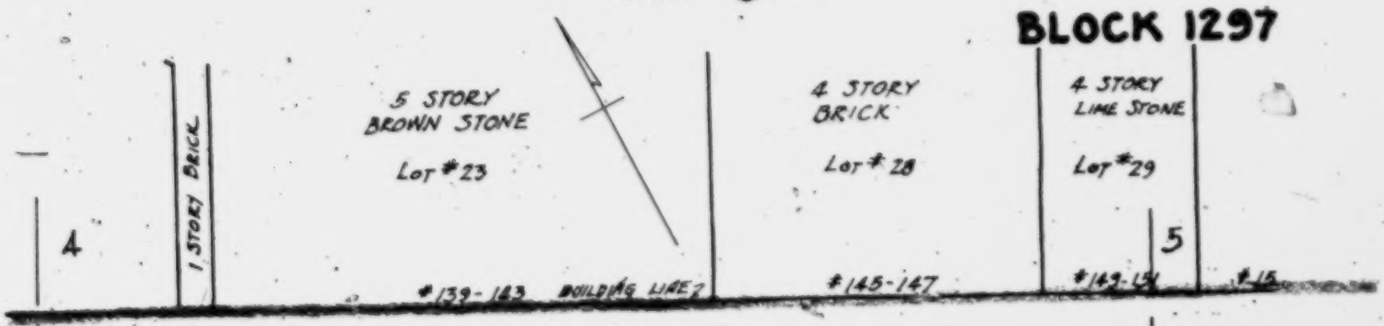
DAMAGE MAP (5)

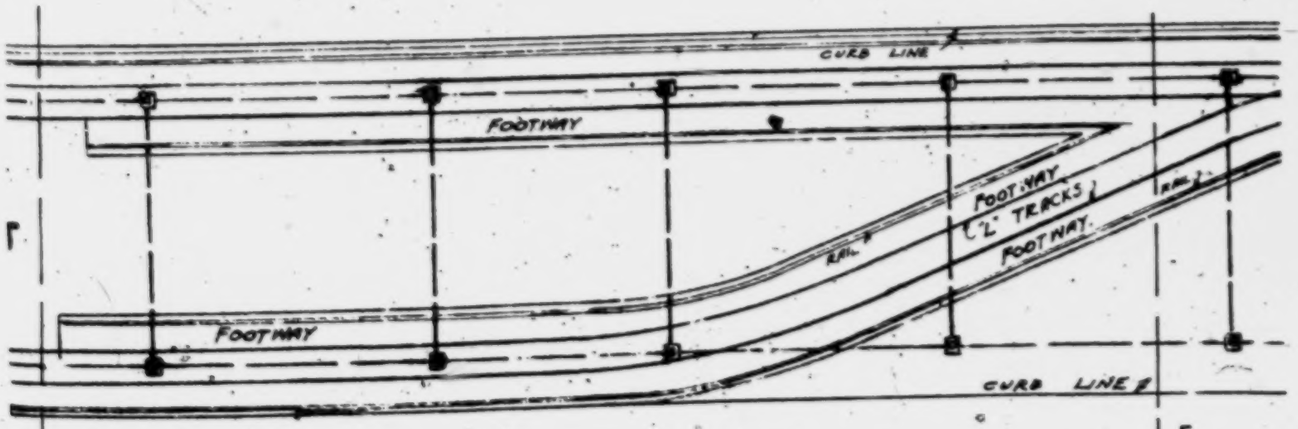




SECTION B-B · LOOKING EAST
SCALE 1" = 13·7'

BLOCK 1297





132-146 BUILDING LINE # 149-154

BLOCK 1296

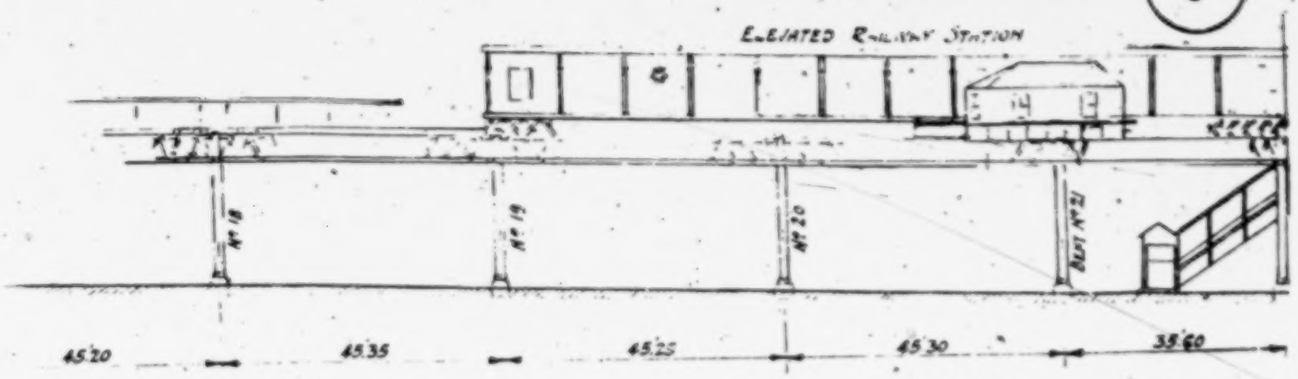
Lot # 46

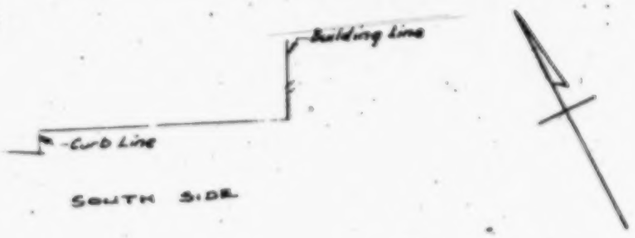
1 STORY:- STORES

Lot # 44-43

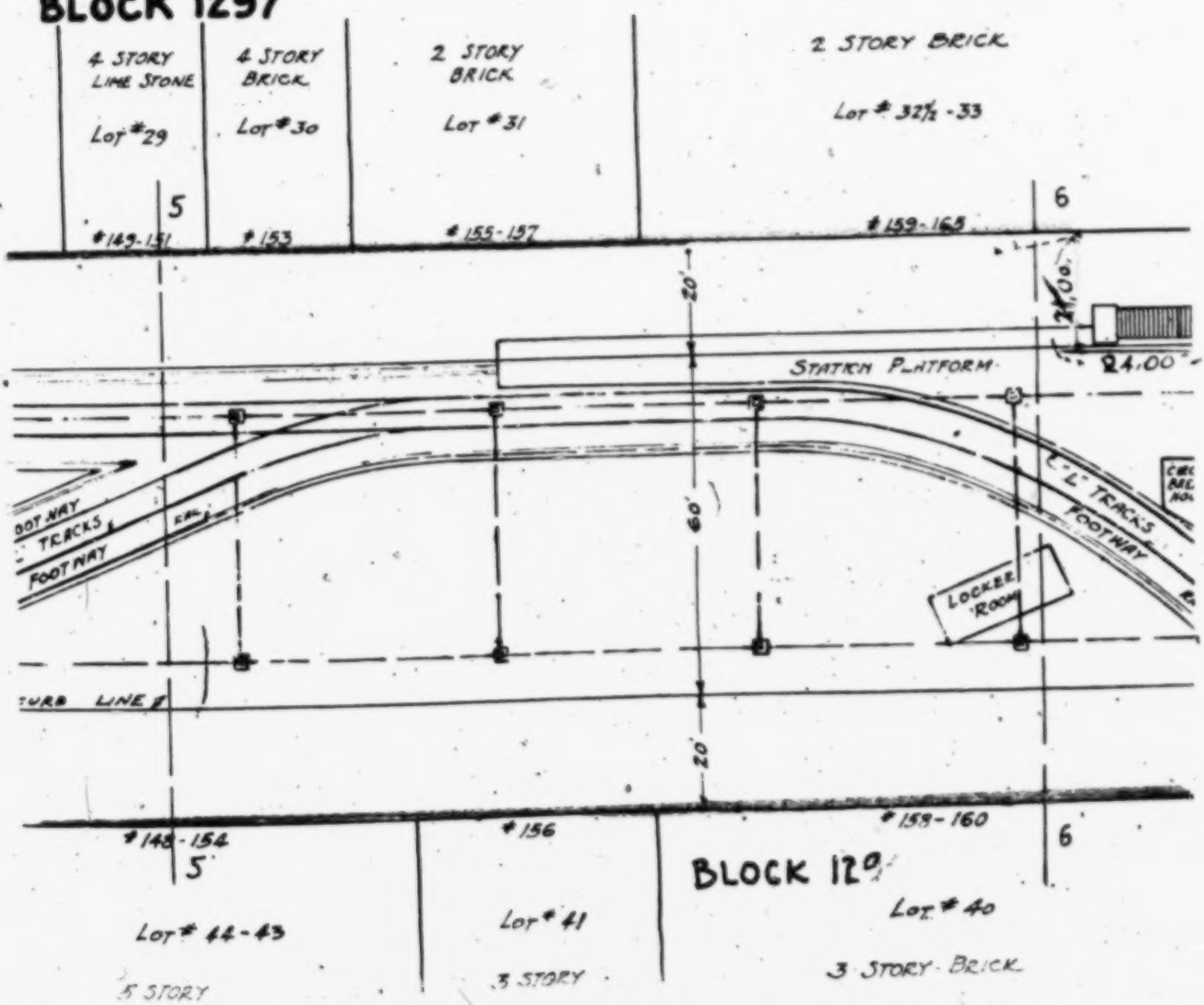
5 STORY
BRICK AND LIME STONE

DAMAGE MAP 6

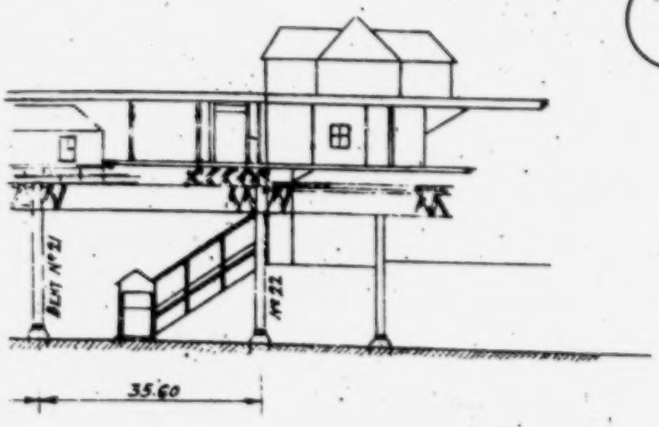




BLOCK 1297



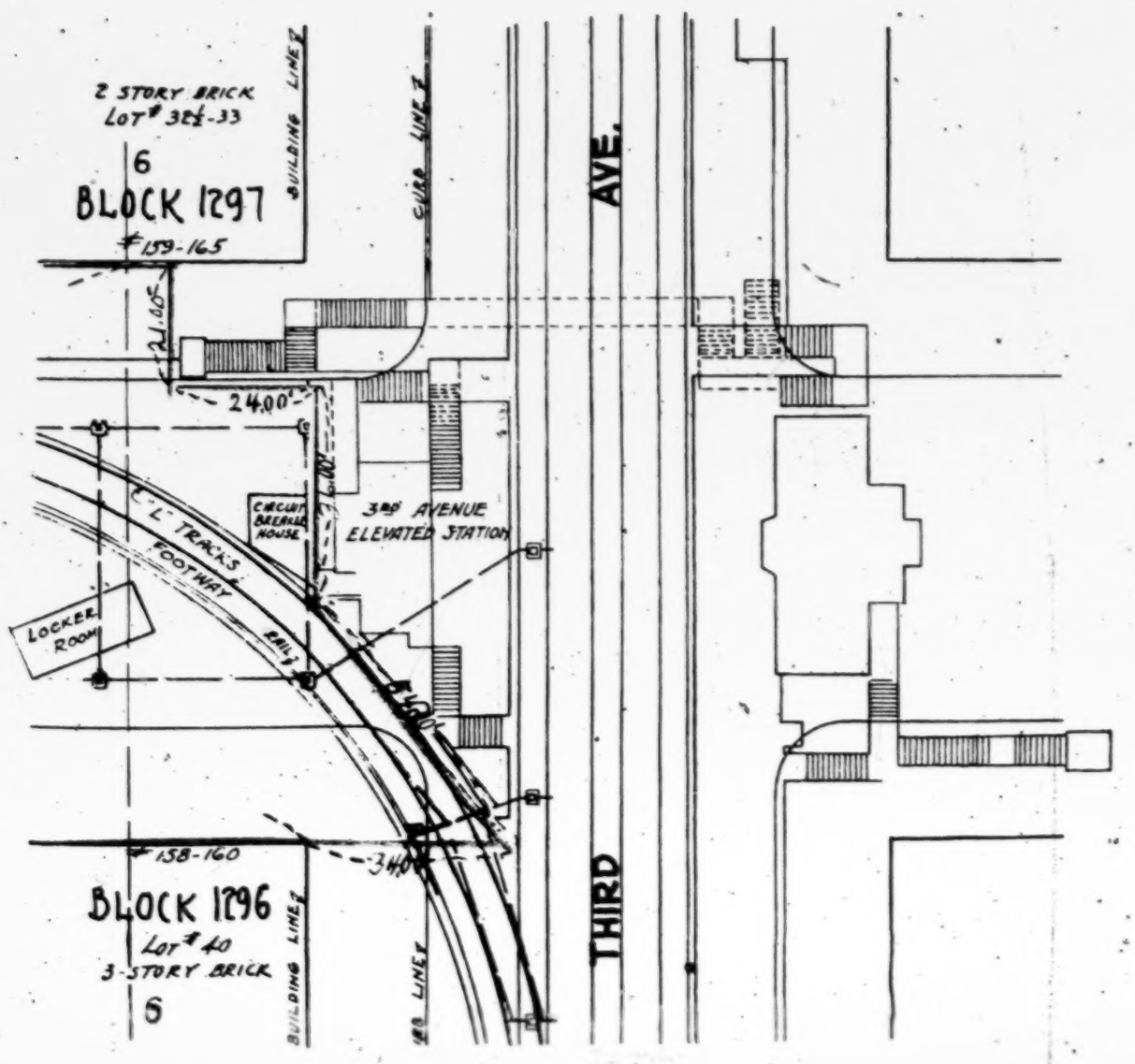
(7) DAMAGE MAP



Dated New York February 28th 1928

James F. Mabley

JUSTICE OF THE SUPREME COURT
OF THE STATE OF NEW YORK



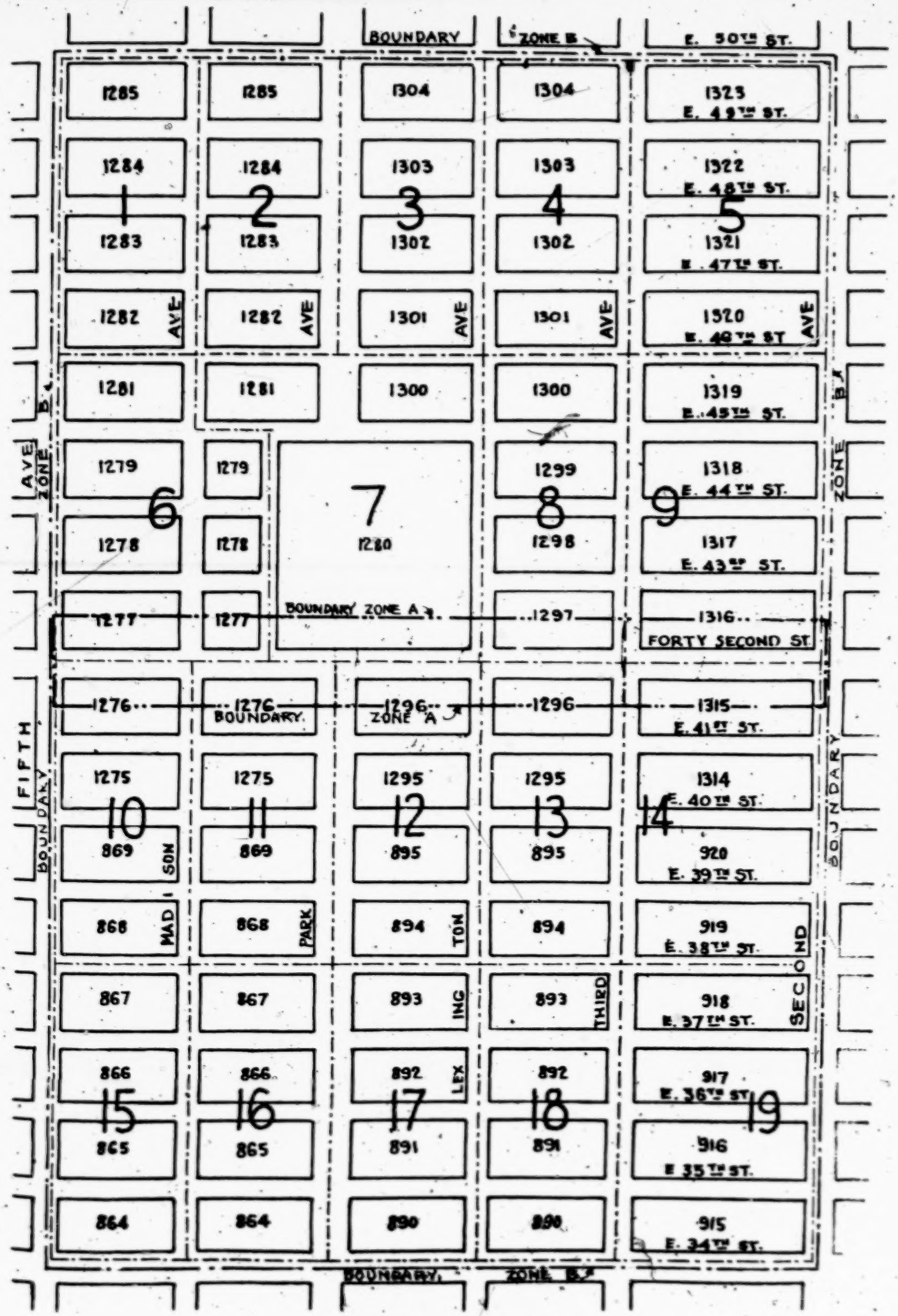
1890

5668

5669

Benefit Maps (Index to Benefit Maps and Sheets 1 to 19 Inclusive)—Attached to the Final Decree of the Supreme Court.

5670



INDEX MAP

BENEFIT MAP

IN THE MATTER OF ACQUIRING TITLE TO THE TRACKS STRUCTURE, STATIONS AND APPURTENANCES OF THE MANHATTAN RAILWAY COMPANY IN EAST 42nd ST BOROUGH OF MANHATTAN

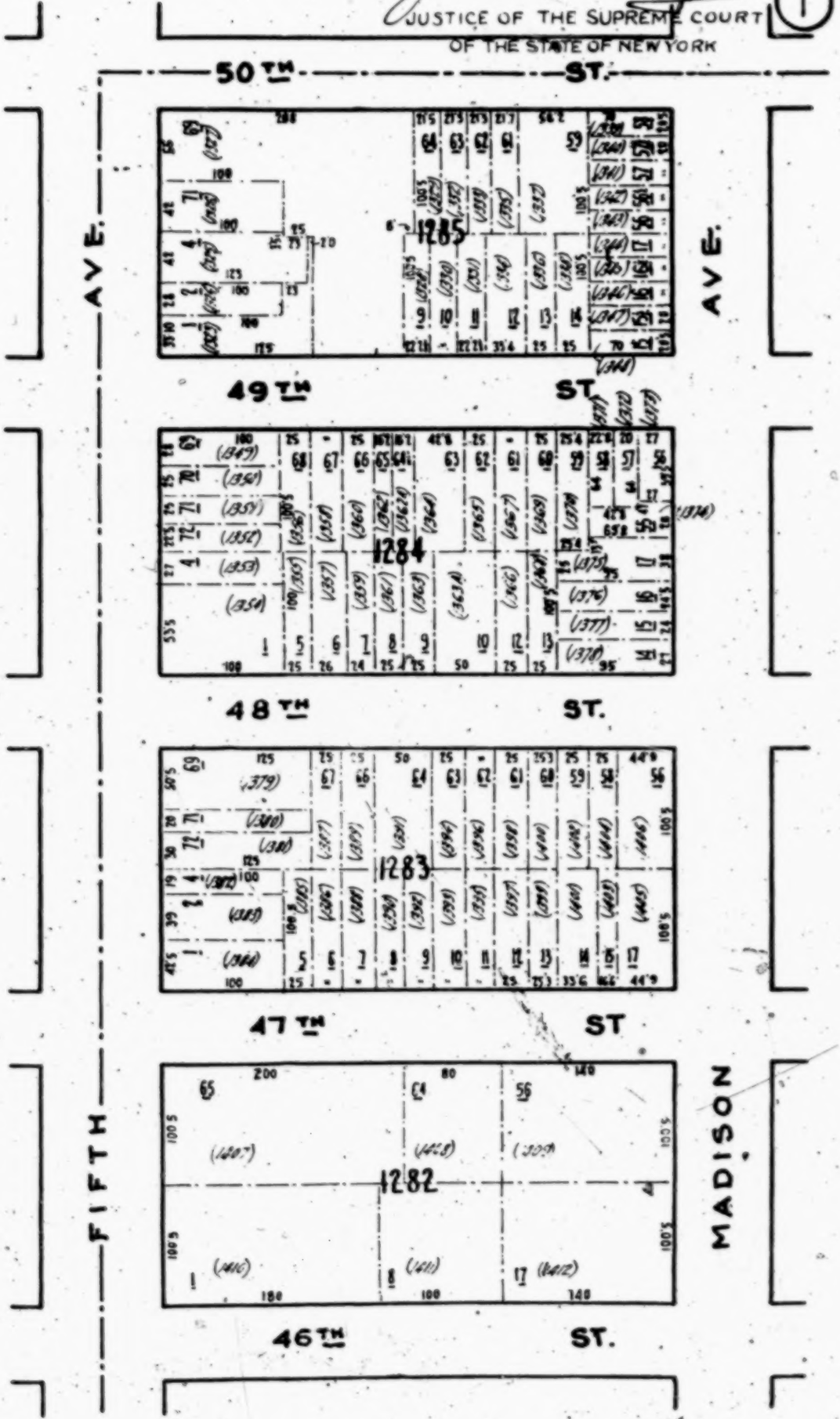
SCALE 1" = 100' DATED: April 15, 1922

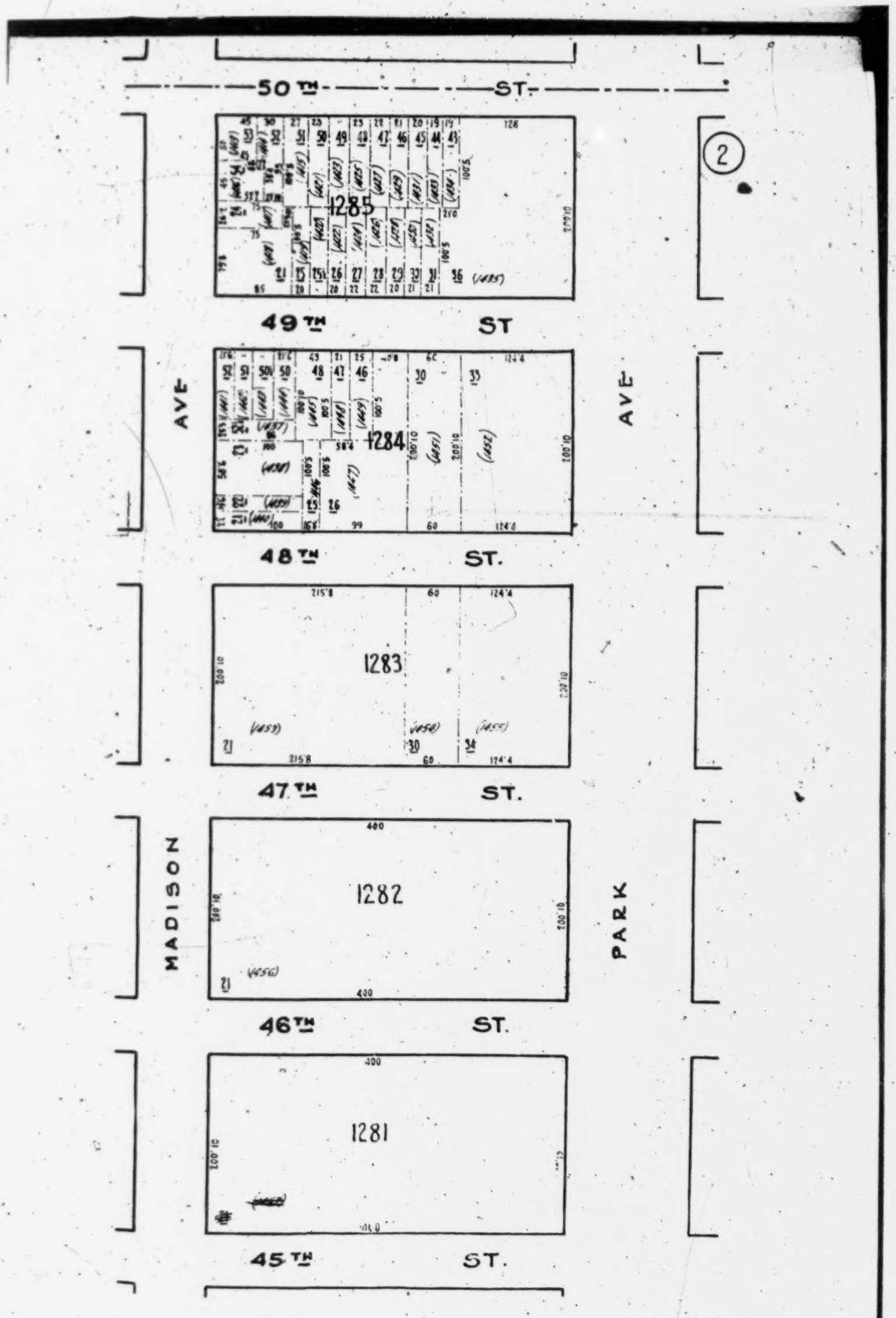
Plat at New York February 28th 1928

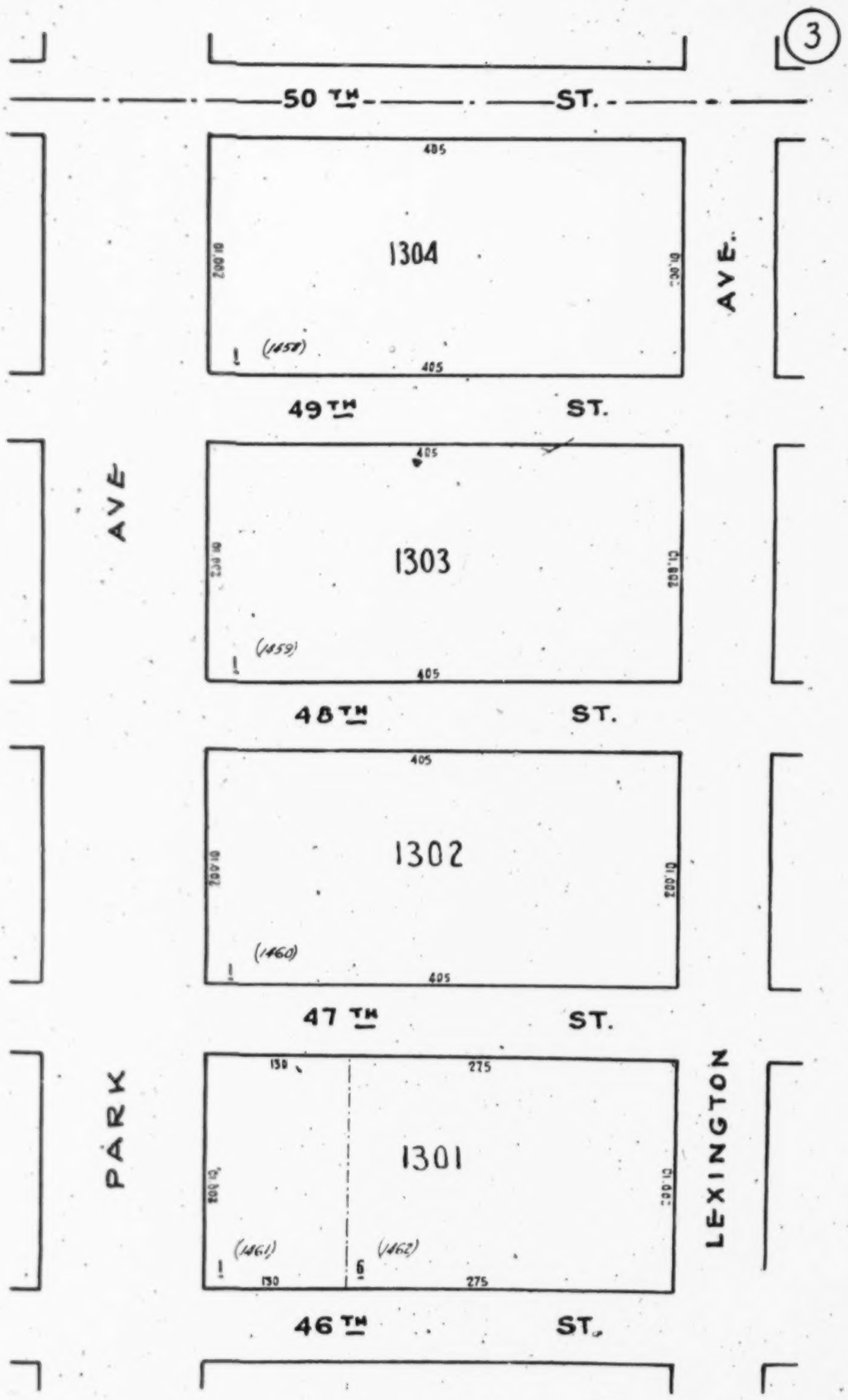
James O'Malley

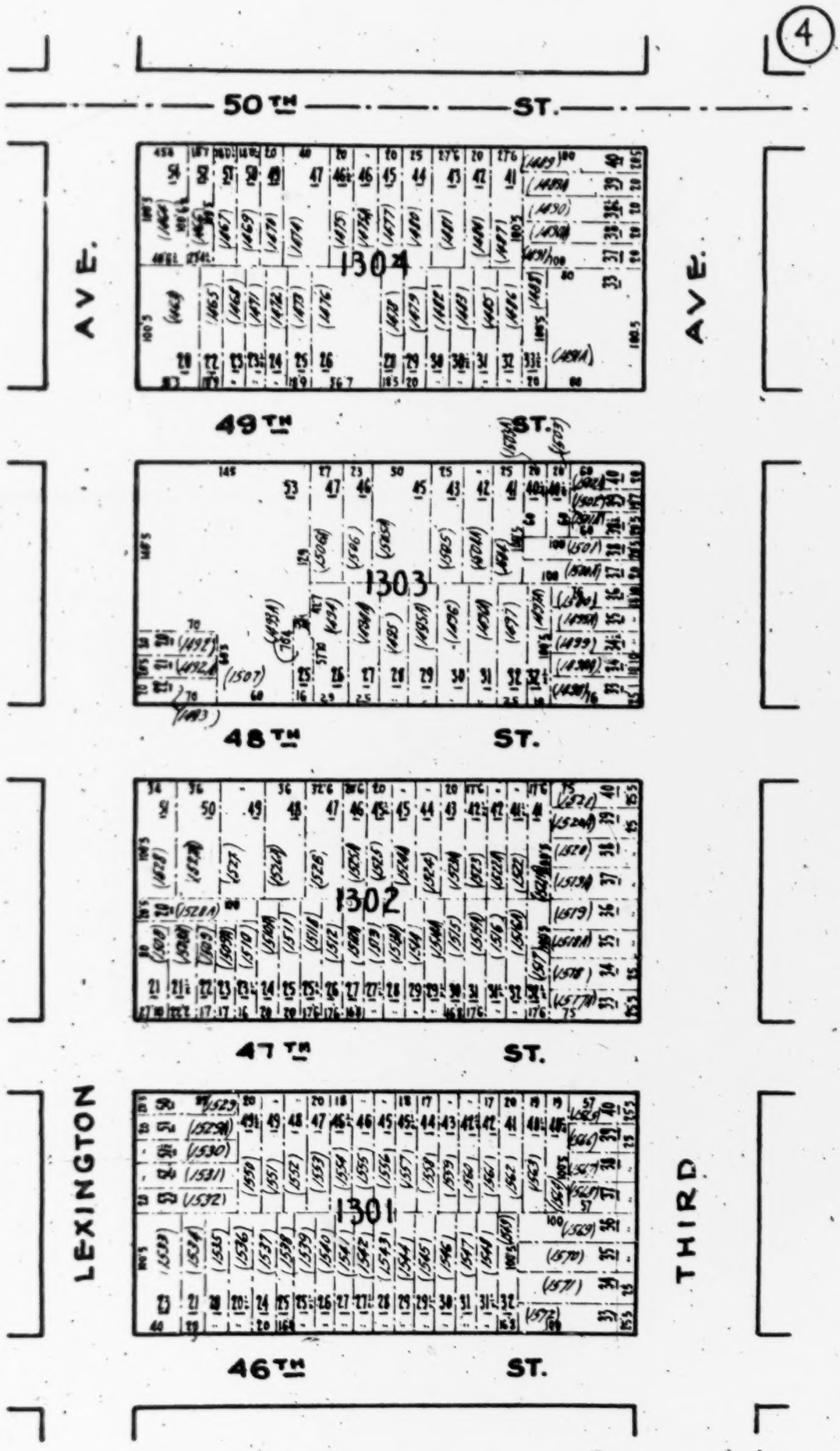
JUSTICE OF THE SUPREME COURT
OF THE STATE OF NEW YORK

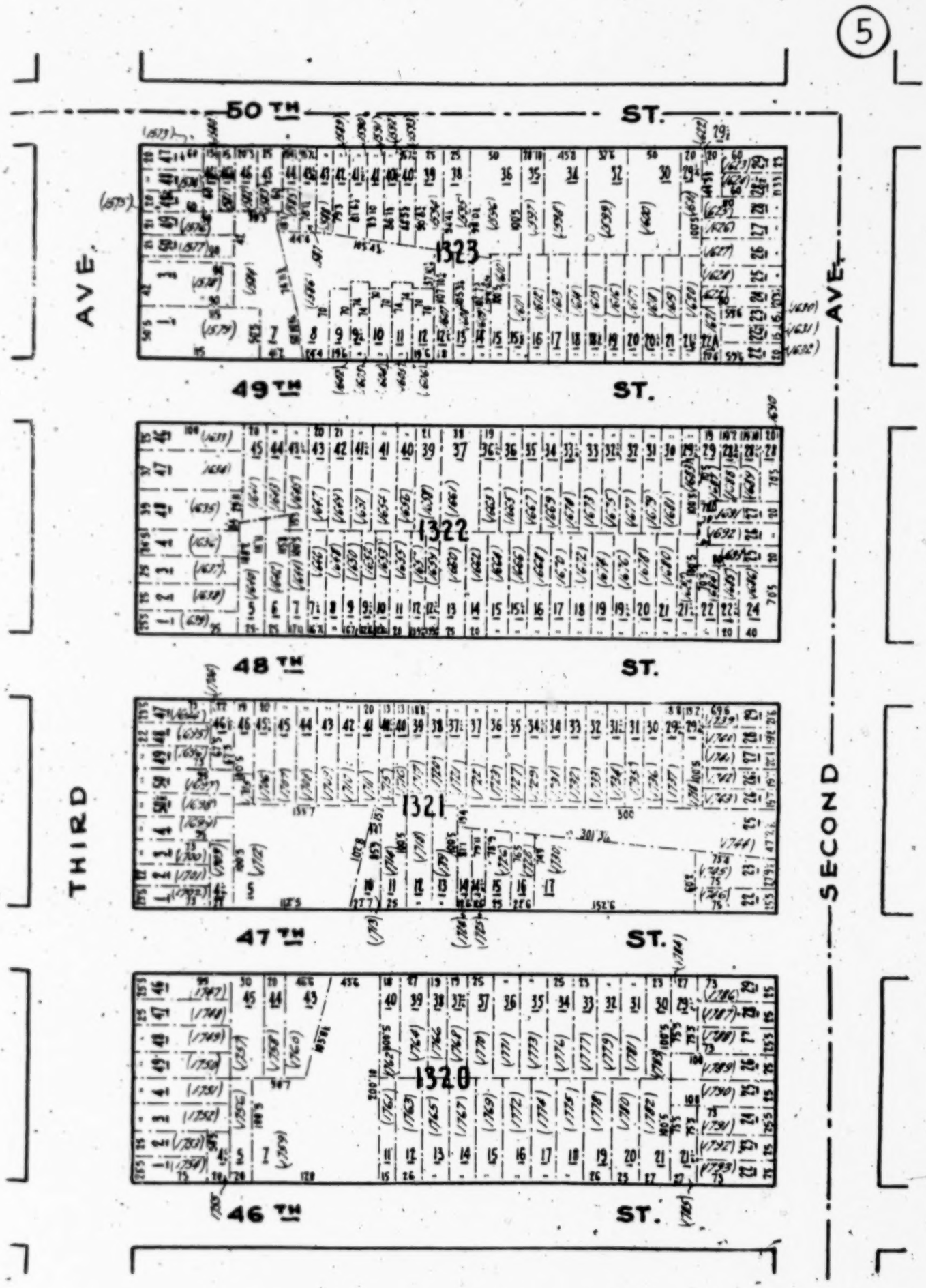
(1)




50TH ST.
1285
2
49TH ST
AVE
1284
AVE
48TH ST.
1283
47TH ST.
MADISON
1282
PARK
46TH ST.
1281
45TH ST.


3
50 TH ST.
1304
405
200'10
200'10
405
(1457)
AVE.
49 TH ST.
1303
405
200'10
200'10
405
(1459)
AVE
48 TH ST.
1302
405
200'10
200'10
405
(1460)
47 TH ST.
1301
130
275
200'10
200'10
130
275
(1461)
(1462)
PARK
LEXINGTON
46 TH ST.


4
50TH ST.
AVE.
AVE.
1304
49TH ST.
1303
48TH ST.
1302
47TH ST.
LEXINGTON
1301
THIRD
46TH ST.


5
50TH ST.
49TH ST.
48TH ST.
47TH ST.
46TH ST.
AVE.
AVE.
THIRD
SECOND
1323
1322
1321
1320

VANDERBILT

AVE.

MADISON

AVE.

6

1279

1278

1277

1279

1278

1277

46TH ST.

45TH ST.

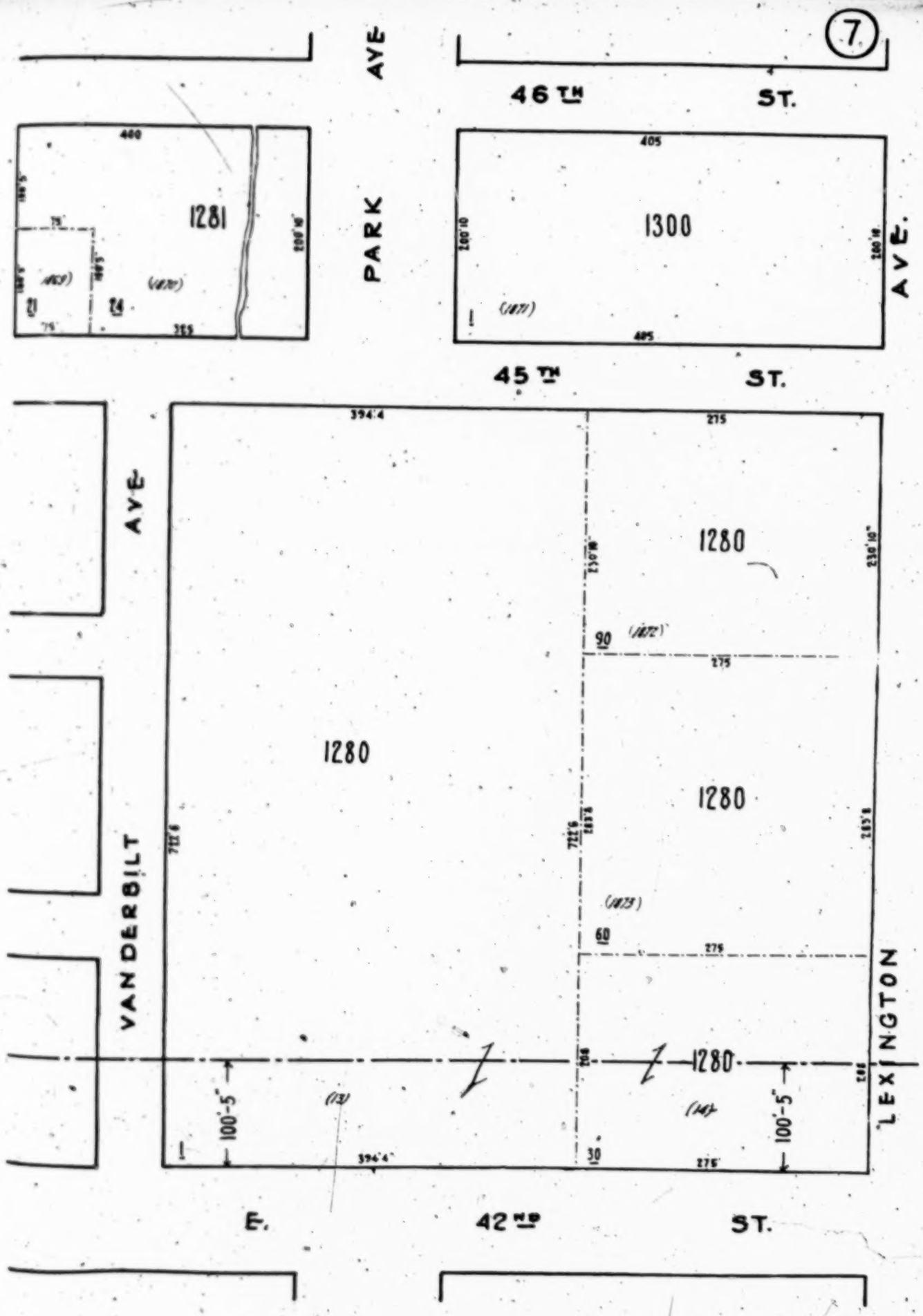
44TH ST.

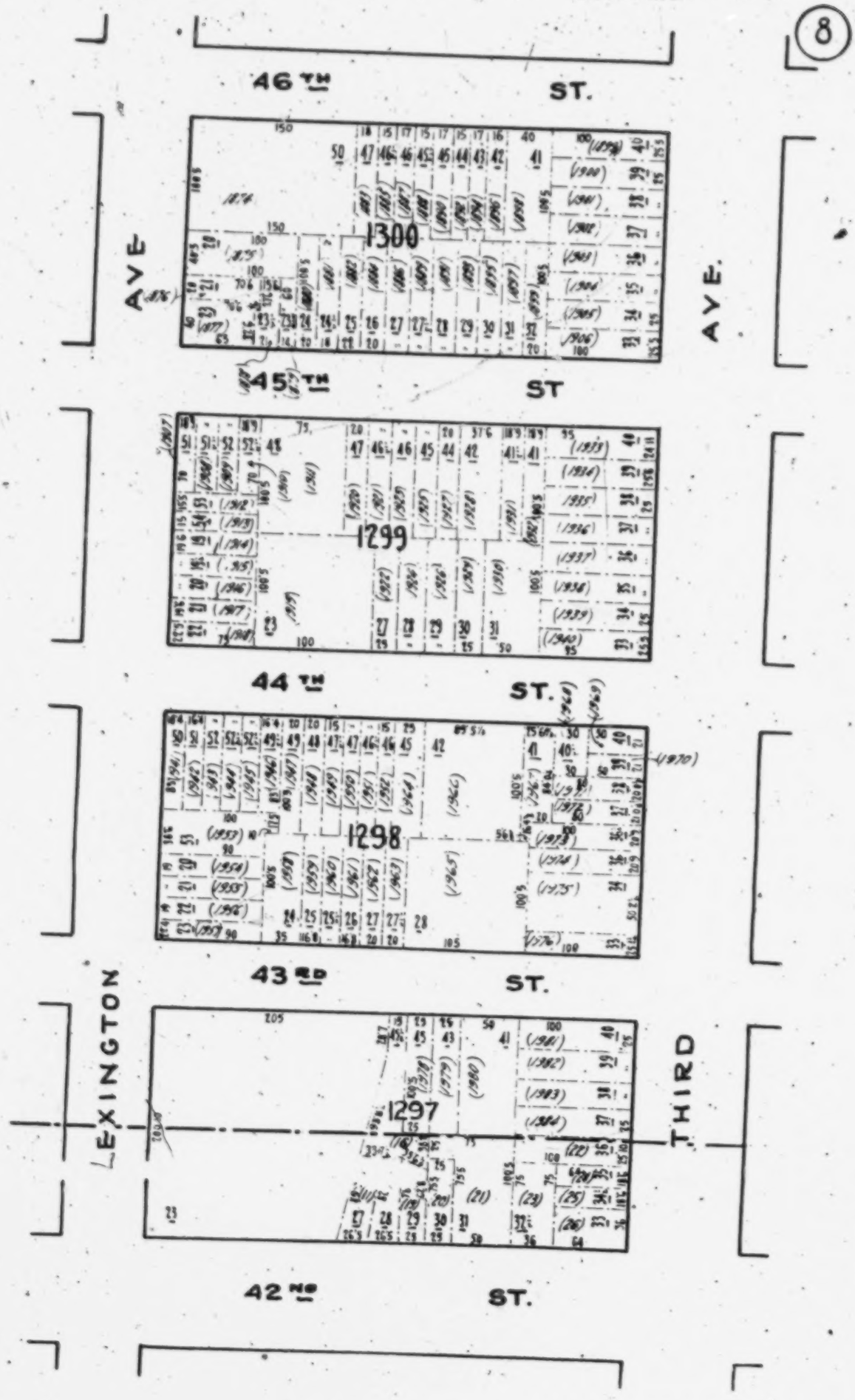
43RD ST.

42ND ST.

AVE.

FIFTH


AVE
46TH ST.
PARK
1281
1300
AVE.
45TH ST.
AVE
1280
1280
1280
1280
VANDERBILT
LEXINGTON
100'-5"
100'-5"
E.
42ND ST.


8
46TH ST.
AVE.
1300
AVE.
45TH ST
1299
44TH ST.
1298
43RD ST.
LEXINGTON
1297
THIRD
42ND ST.

AVE. 9

SECOND

ST.

ST.

ST.

ST.

ST.

46TH

45TH

44TH

43RD

42ND

1319

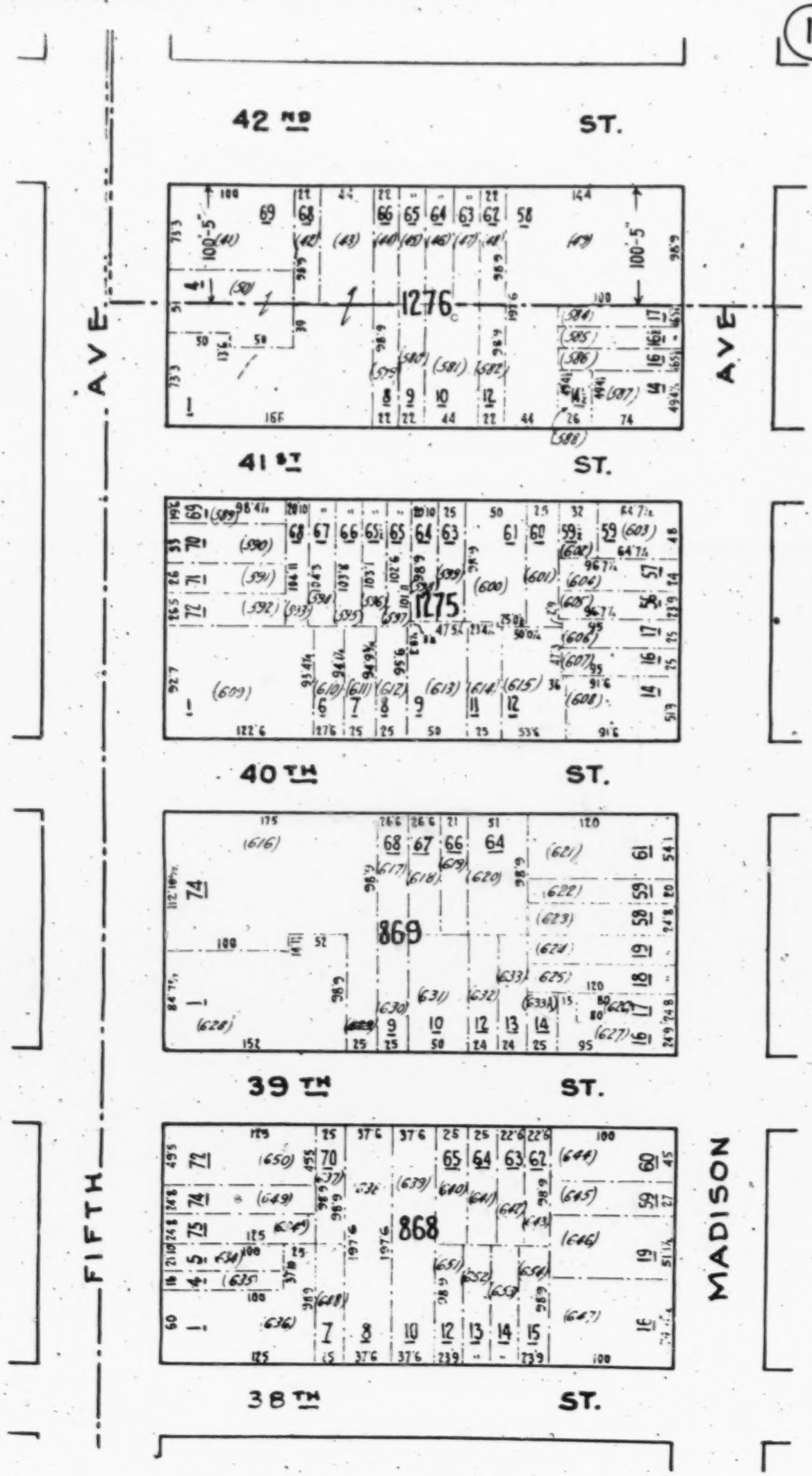
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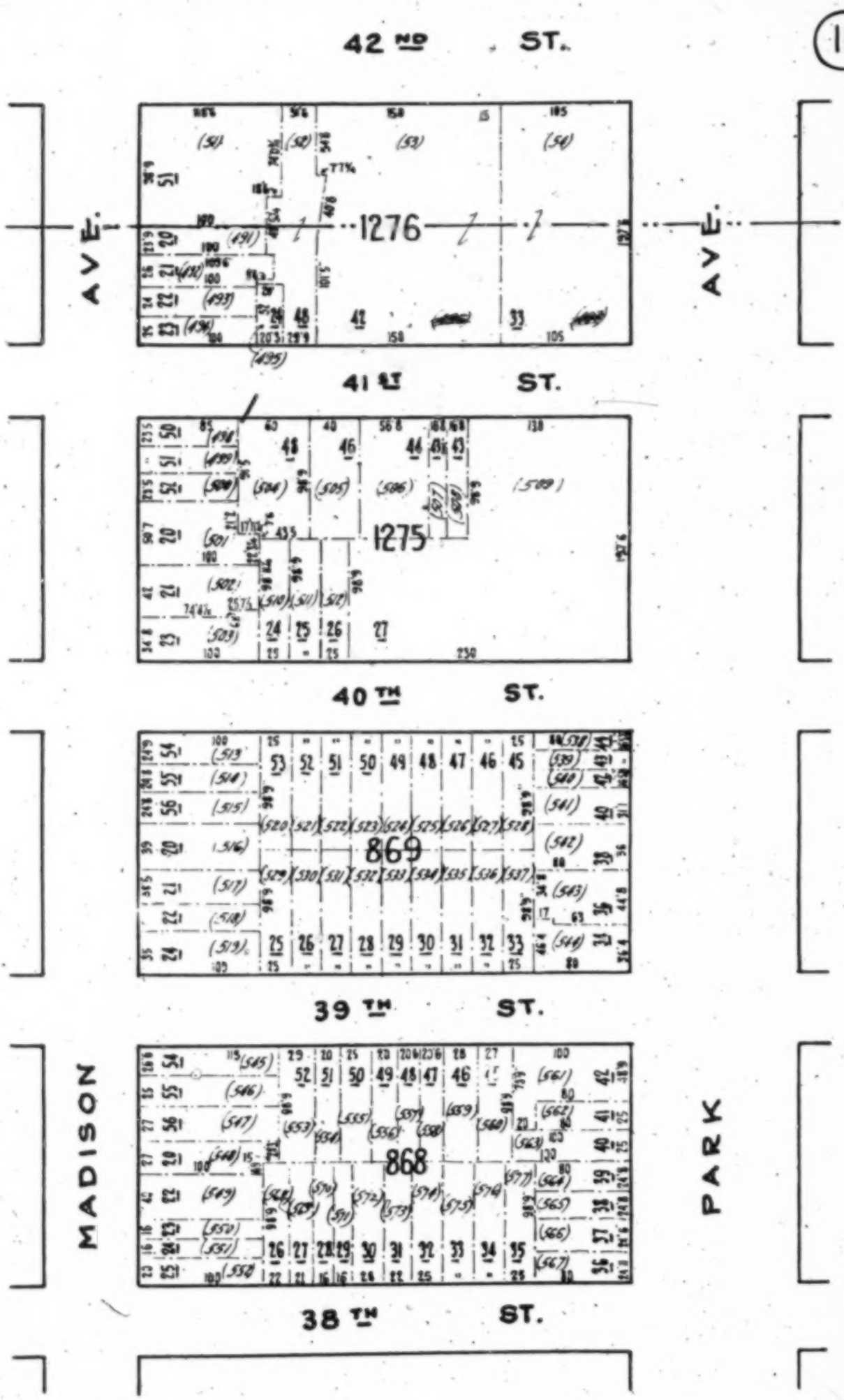
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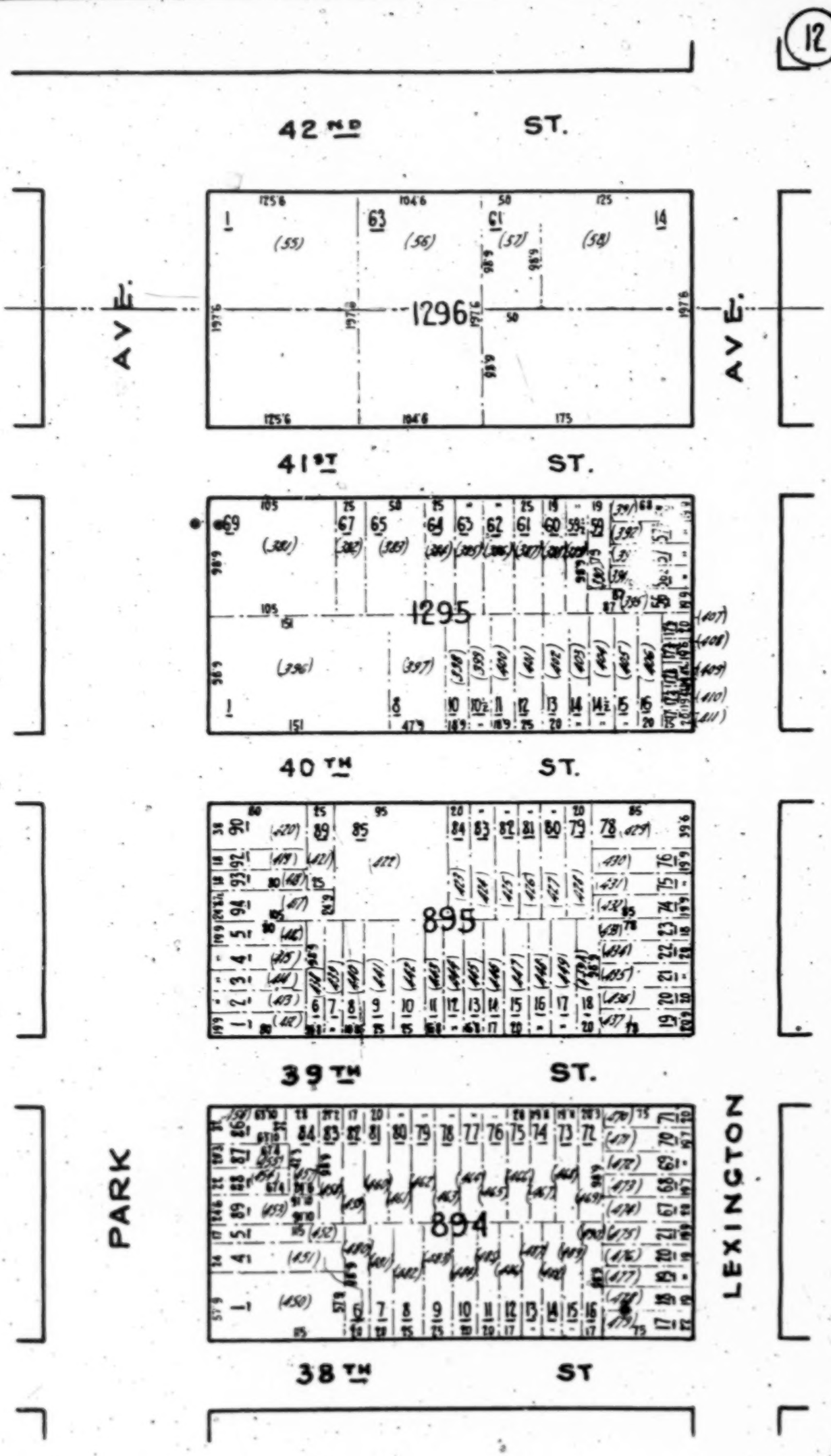
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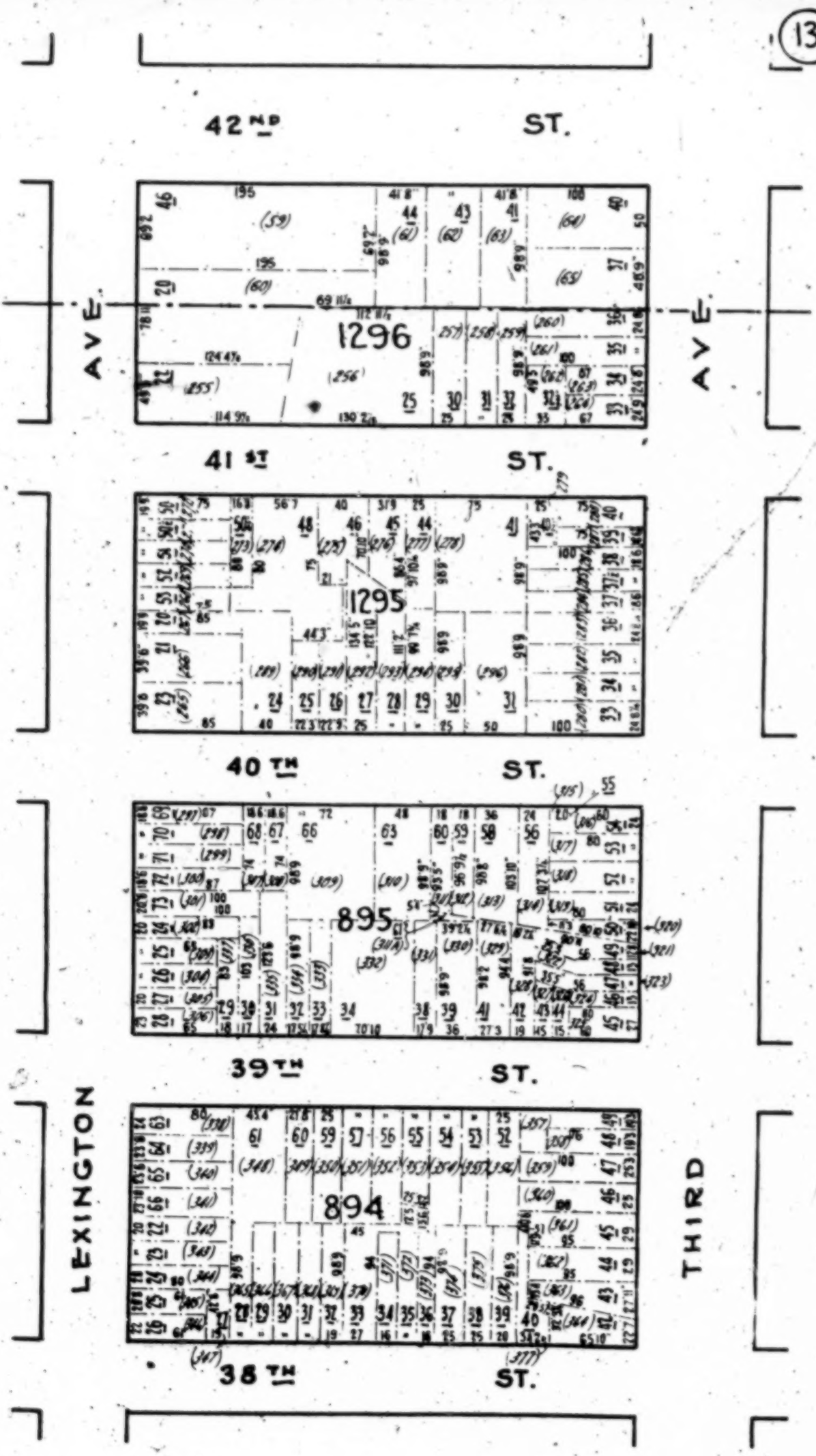
AVE.

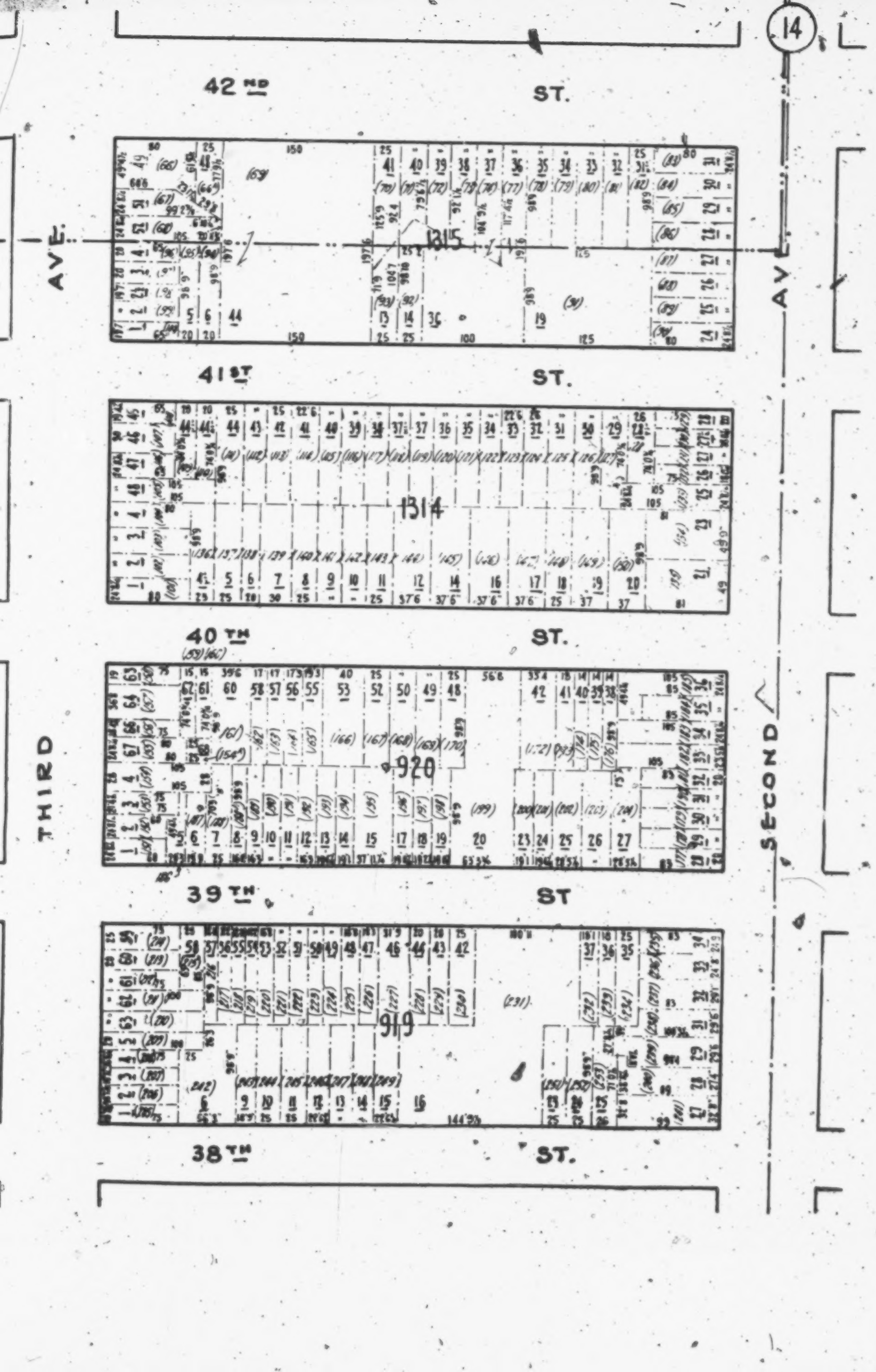
THIRD

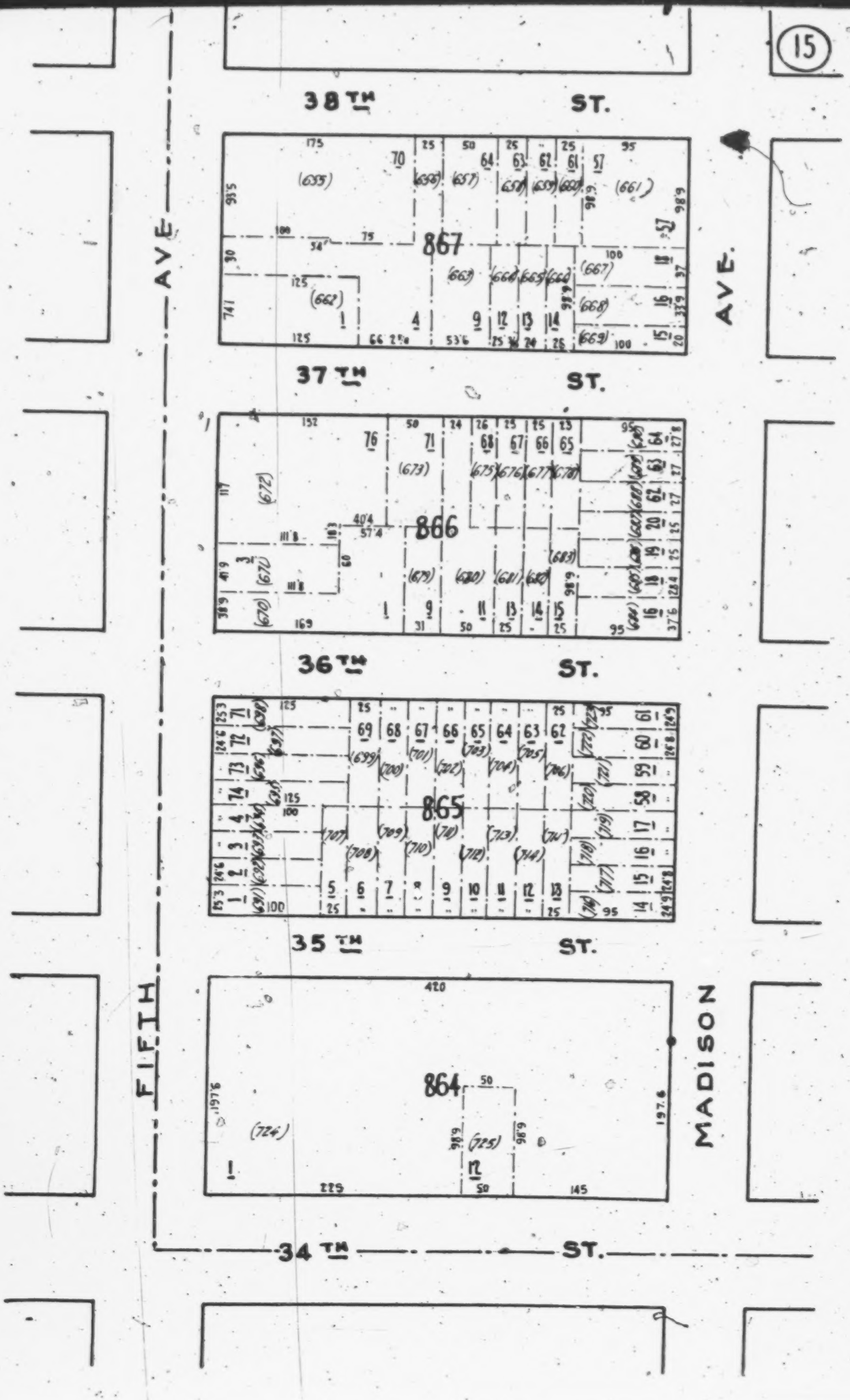

42ND ST.
AVE
1276
AVE
41ST ST.
1275
40TH ST.
869
39TH ST.
FIFTH
868
MADISON
38TH ST.


42 ND ST.
11
AVE.
1276
AVE.
41 ST ST.
1275
40 TH ST.
869
39 TH ST.
MADISON
868
PARK
38 TH ST.

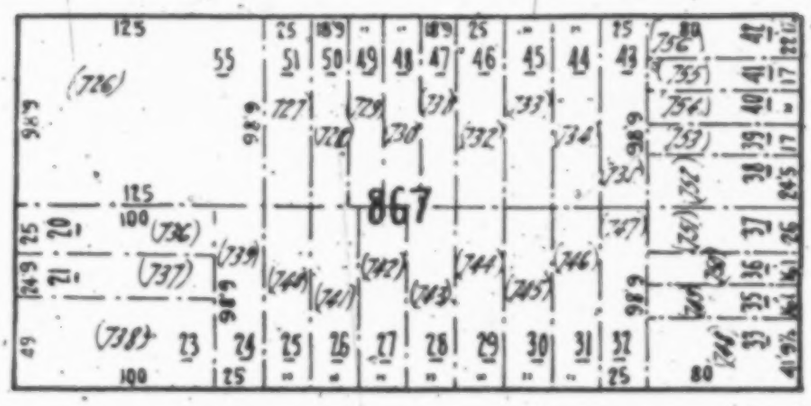

42ND ST.
AVE.
1296
AVE.
41ST ST.
1295
40TH ST.
895
39TH ST.
PARK
894
LEXINGTON
38TH ST


42ND ST.
AVE.
1296
AVE.
41 ST ST.
1295
40TH ST.
895
39TH ST.
LEXINGTON
894
THIRD
38TH ST.


14
42 ND ST.
AVE.
1315
41 ST ST.
1314
40 TH ST.
THIRD
920
SECOND
39 TH ST
919
38 TH ST.


38TH ST.
37TH ST.
36TH ST.
35TH ST.
34TH ST.
FIFTH AVE.
MADISON AVE.
867
866
865
864

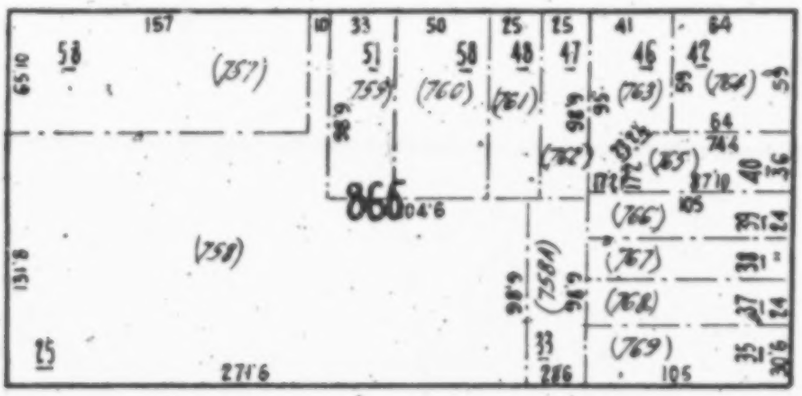
38 TH ST.



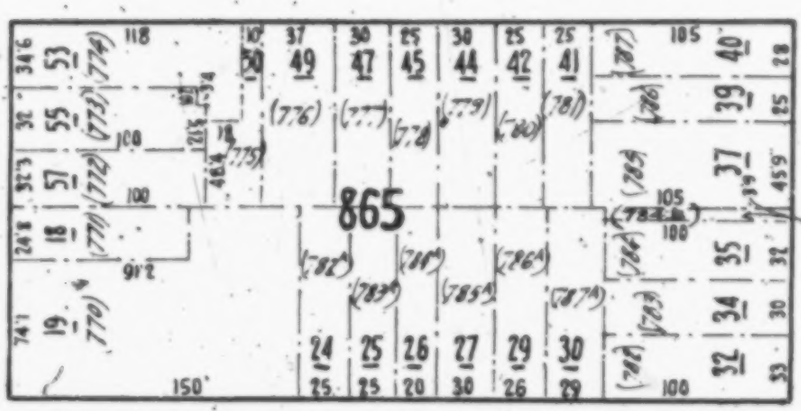
AVE.

AVE

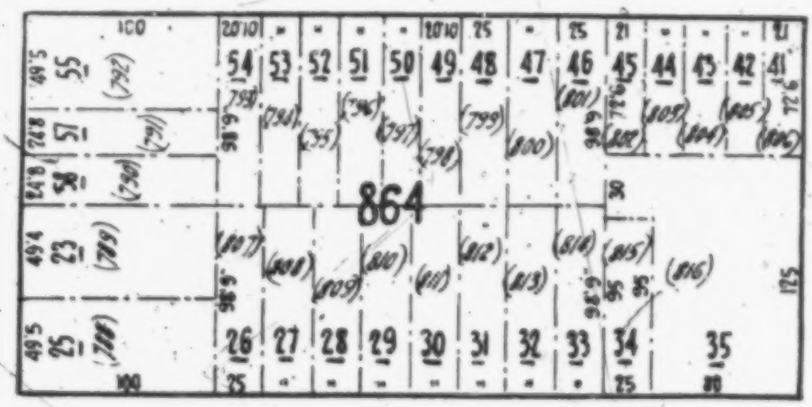
37 TH ST.



36 TH ST.



35 TH ST.



MADISON

PARK

34 TH ST.

17

AVE.

ST.

893

892

891

890

ST.

ST.

ST.

FIFTY-FIRST

38 TH

37 TH

36 TH

35 TH

34 TH

AVE.

PARK

18

AV

THIRD

ST.

38TH

37TH

36TH

35TH

34TH

AVE

LEXINGTON

893

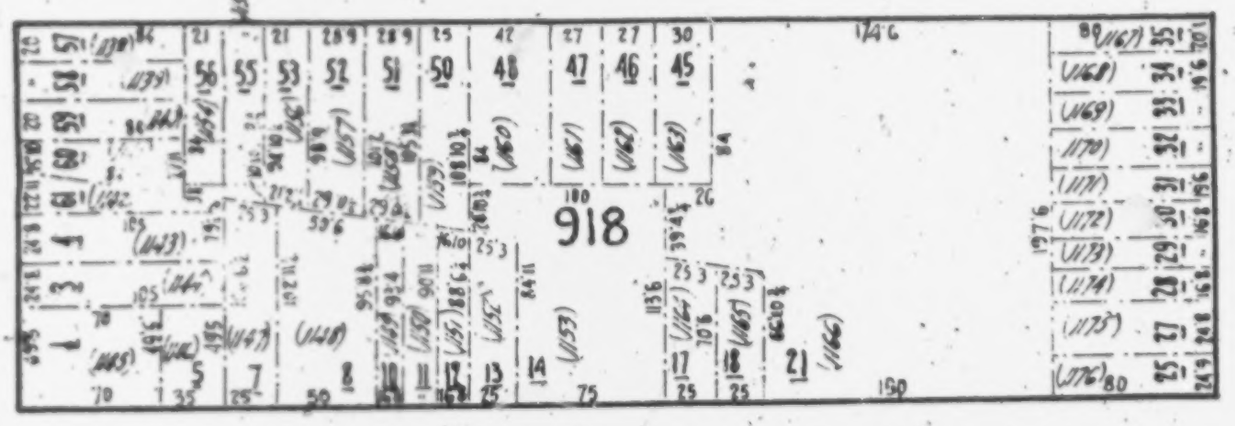
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891

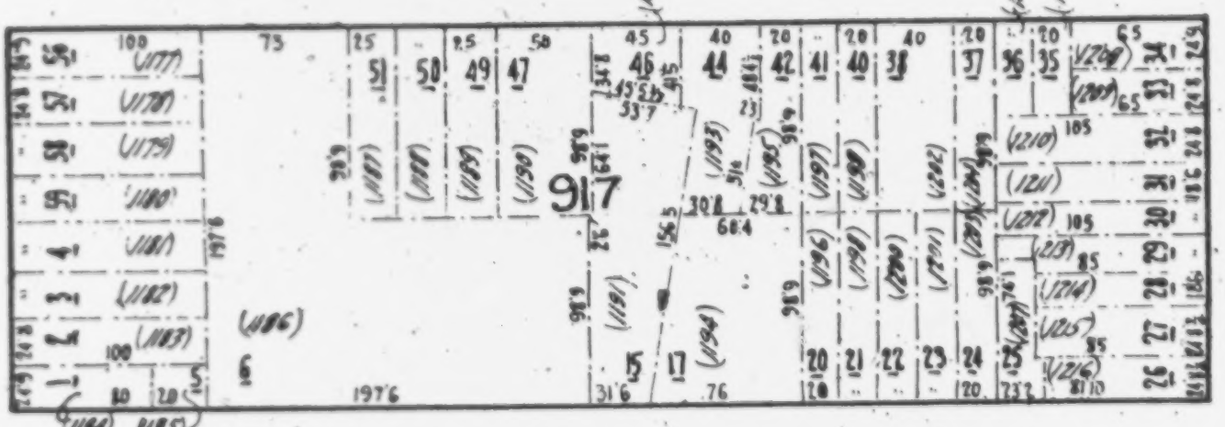
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38 TH ST.

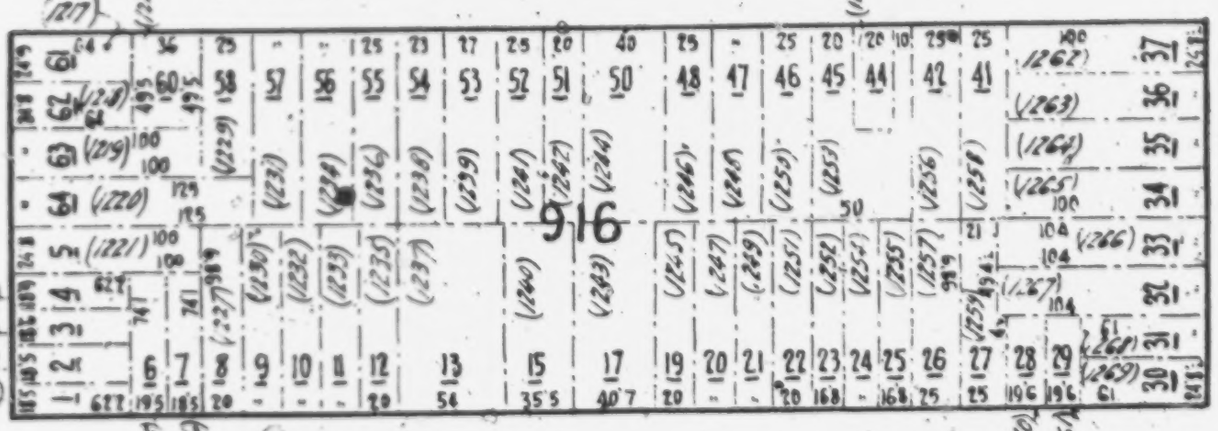
AVE.



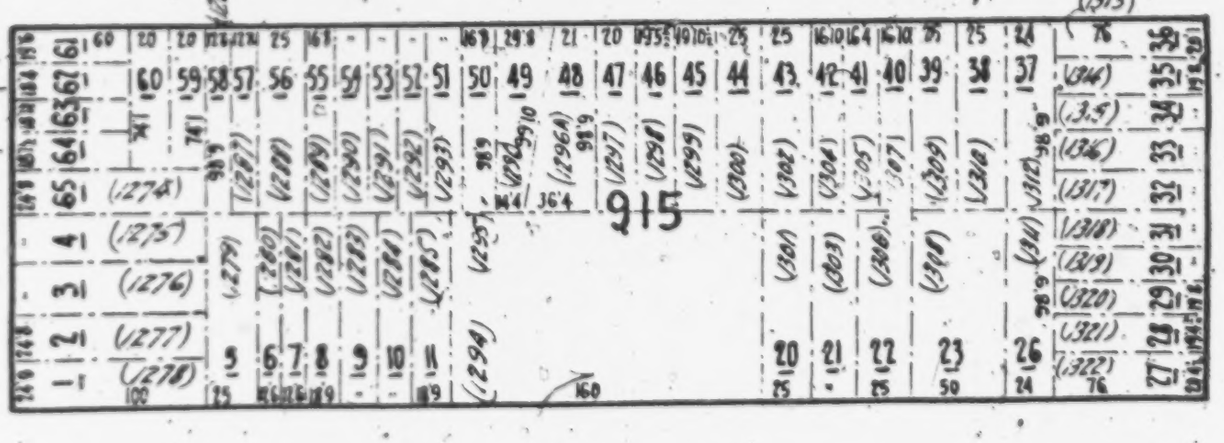
37 TH ST.



36 TH ST.



35 TH ST.



THIRD AVE.

SECOND AVE.

34 TH ST

5674 **City's Exhibits "46-A," "46-B," "46-C," "46-D," "46-E," "46-F," "46-G," "46-H," "46-I," "46-J," "46-K," "46-L," "46-M," "46-N," "46-O" and "46-P"—Sixteen (16) Photographs Showing North and South Sides of 42nd Street Between Park and 3rd Avenues Including Structures and Abutting Properties.**

City's Exhibit "46-A"—Photograph showing north side of 42nd Street about 100 feet west of 3rd Avenue corner looking west.

City's Exhibit "46-B"—Photograph taken standing at northeast corner of 42nd Street and Lexington Avenue looking west showing distance between columns and curb line on north side of 42nd Street.

City's Exhibit "46-C"—Photograph taken standing on the southeast corner of 42nd Street and Lexington Avenue looking west showing dis-
5675 tance between line of columns and curb line on south side of 42nd Street.

City's Exhibit "46-D"—Photograph taken standing on northeast corner of 42nd Street and Lexington Avenue looking east.

City's Exhibit "46-E"—Photograph taken standing on southeast corner of 42nd Street and Lexington Avenue looking east.

City's Exhibit "46-F"—Photograph taken standing on southwest corner of 42nd Street and Lexington Avenue looking west.

City's Exhibit "46-G"—Photograph taken standing on northwest corner of 42nd Street and Lexington Avenue looking west.

City's Exhibit "46-H"—Photograph showing north side of 42nd Street directly opposite Park Avenue looking east.

City's Exhibit "46-I"—Photograph showing south side of 42nd Street looking east at southeast corner of 42nd Street and Park Avenue.

5676 City's Exhibit "46-J"—Photograph showing south side of 42nd Street about center of Pershing Square looking northeast at west stairway to station.

City's Exhibit "46-K"—Photograph taken standing on south side of structure at west end of line looking east.

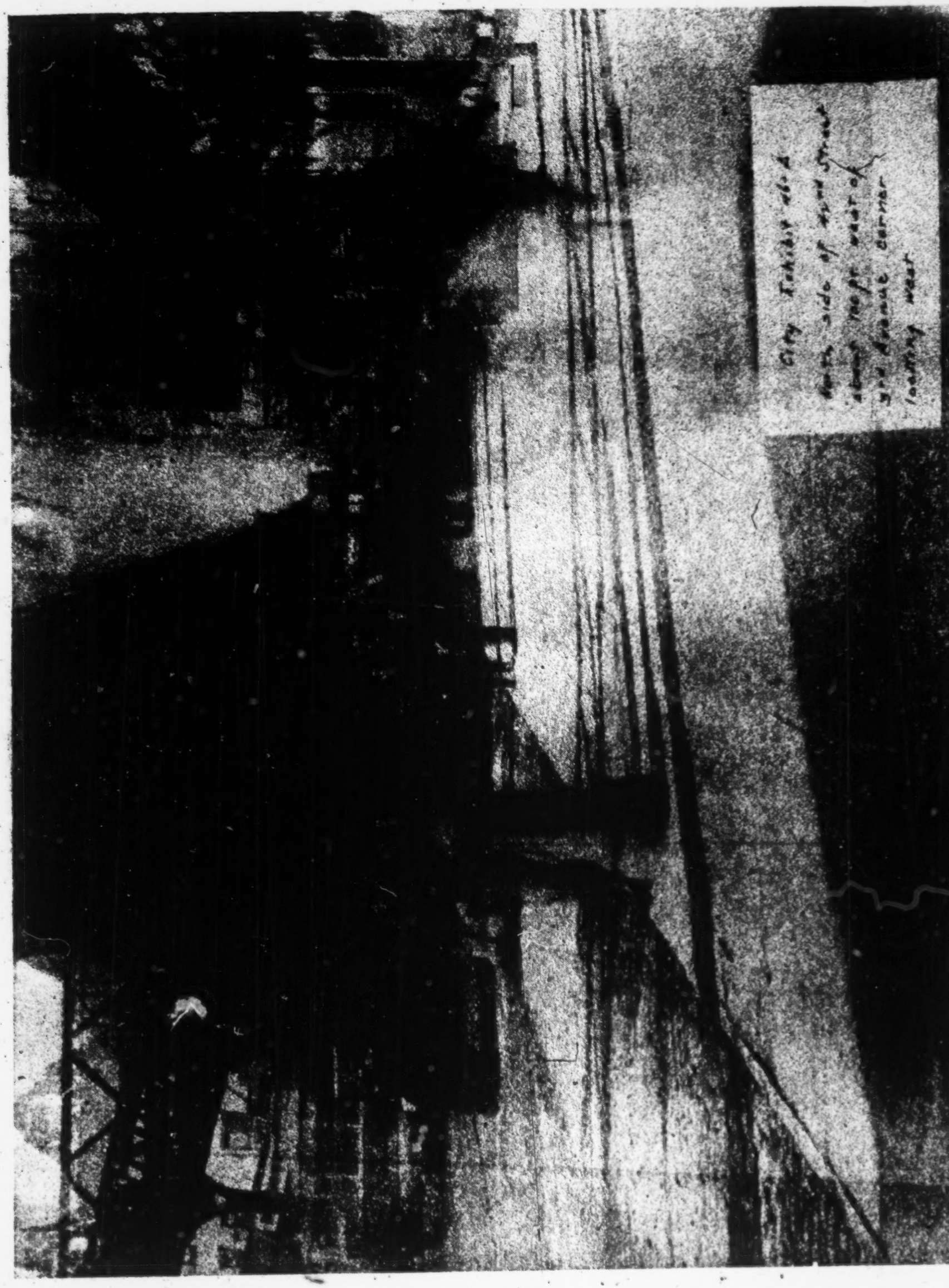
City's Exhibit "46-L"—Photograph taken standing on north side of structure at west end of line looking east.

City's Exhibit "46-M"—Photograph taken midway between north and south of 42nd Street on structure looking east.

City's Exhibit "46-N"—Photograph taken midway between north and south side of 42nd Street on structure looking west.

City's Exhibit "46-O"—Photograph showing south side of structure at 3rd Avenue looking west.

City's Exhibit "46-P"—Photograph taken on platform on north side of structure looking west showing 3rd Avenue shuttle, 42nd Street structure.





City Exhibit 46-B

Standing at Northeast corner of 42nd Street and Lexington Ave looking west showing distance between columns

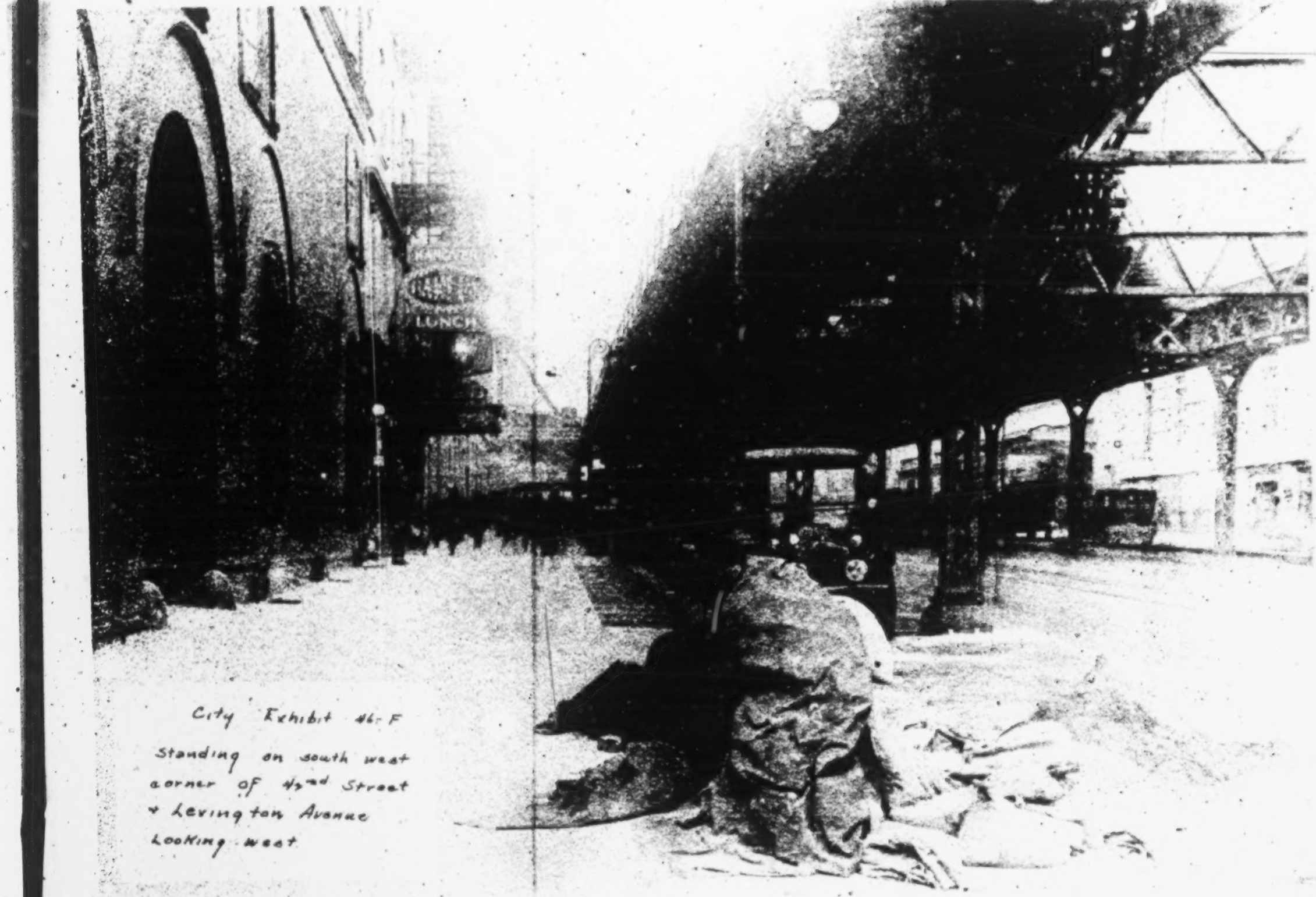
City Exhibit 46-C

Standing on the southeast corner of 42nd St. and Lexington Ave. looking west. showing distance between line of columns and curb line on south side



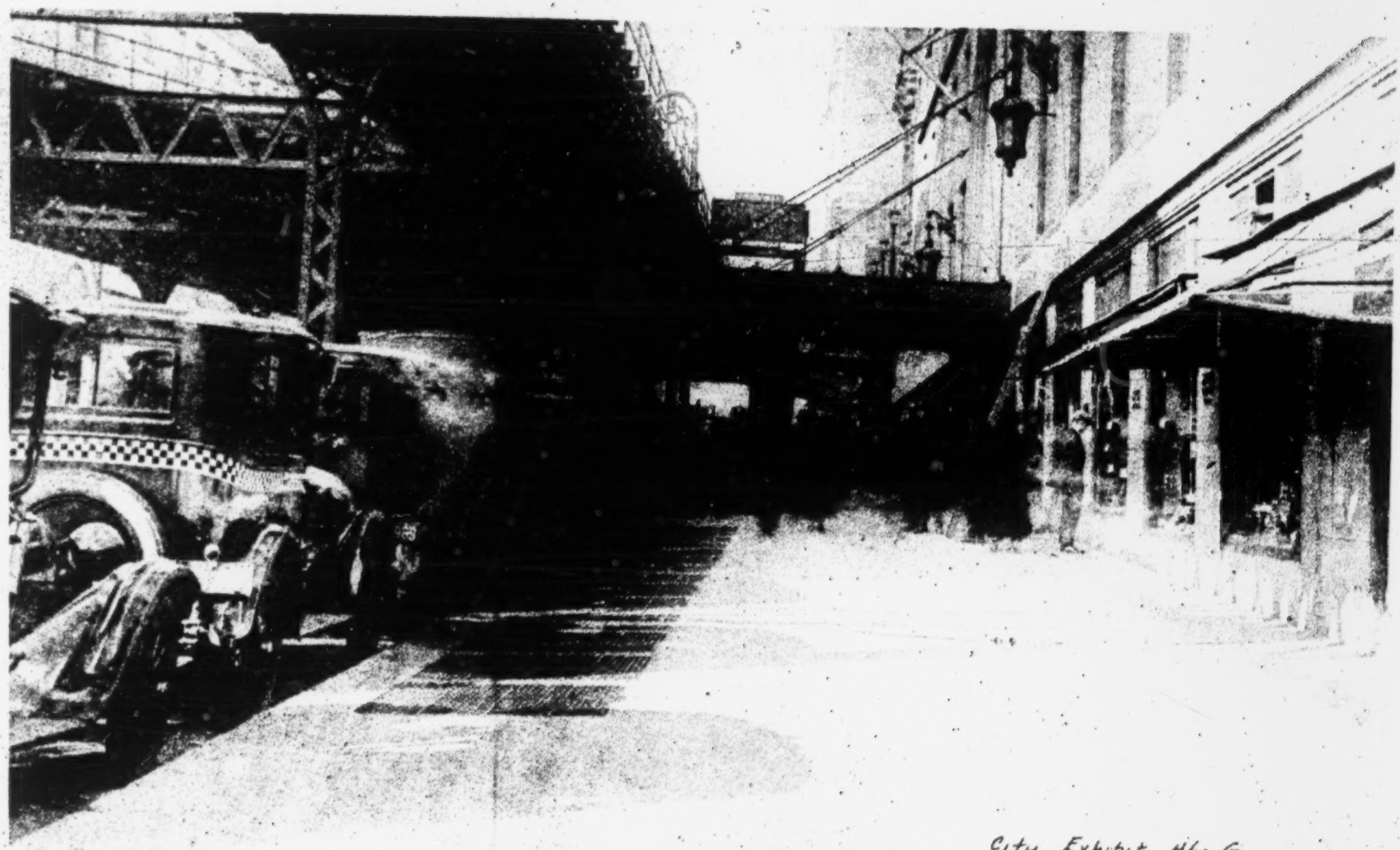


City Exhibit 46-E
Standing on south east corner of 42nd Street and Lexington Avenue. Looking east.



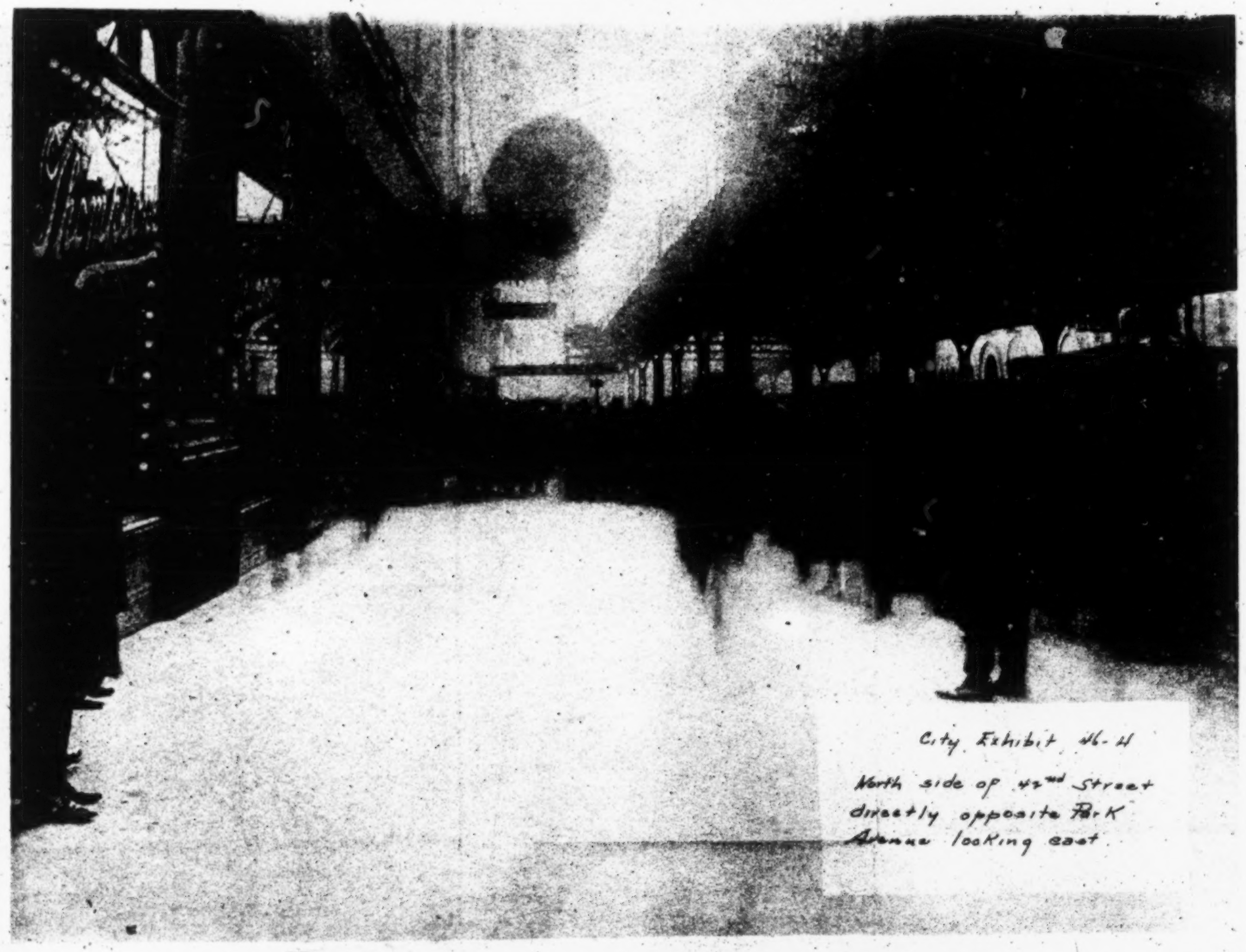
City Exhibit #6: F

Standing on south west corner of 43rd Street & Lexington Avenue Looking west



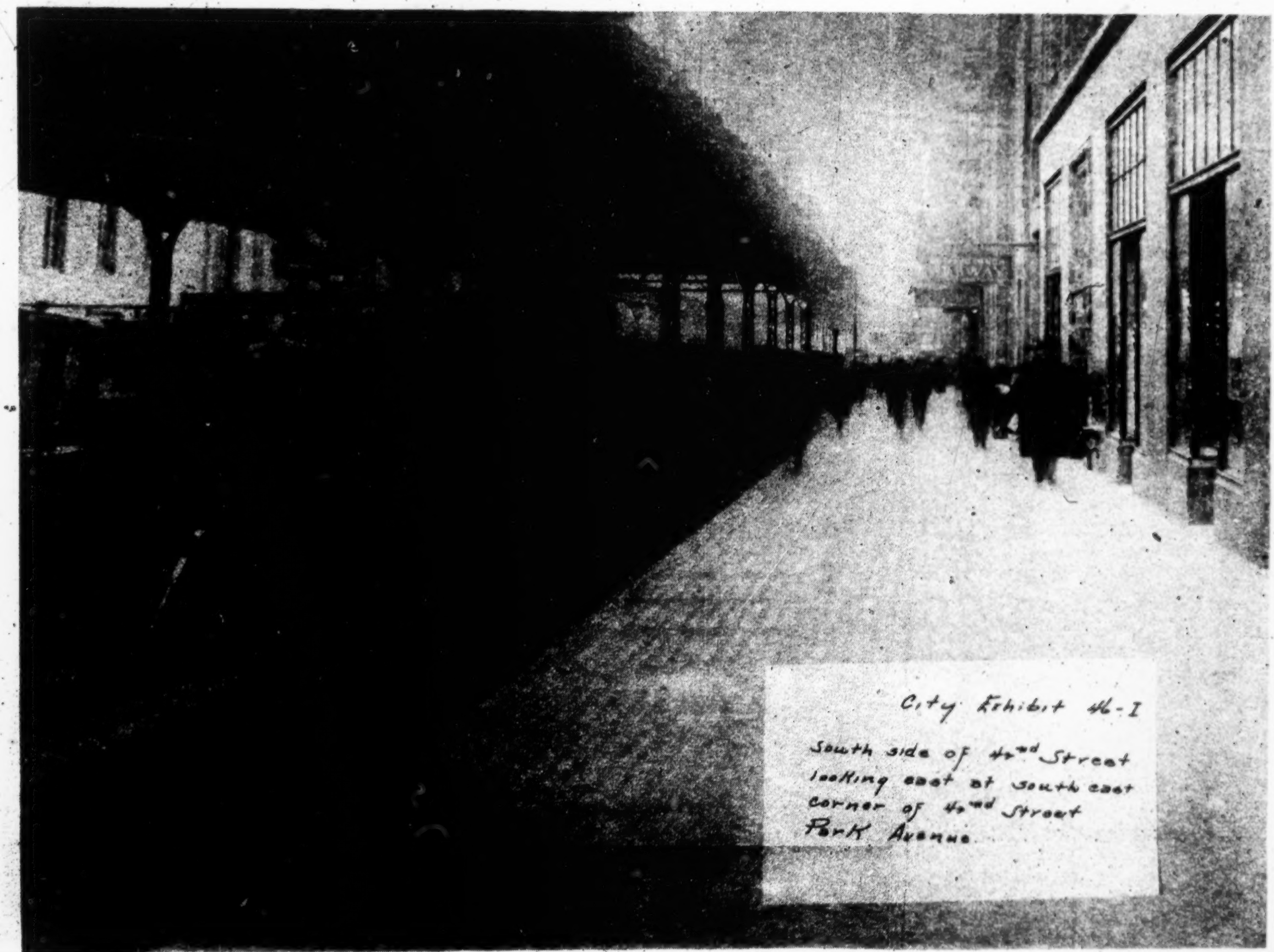
City Exhibit 46-G

Standing on north west corner of 42nd Street Lexington Avenue looking west.



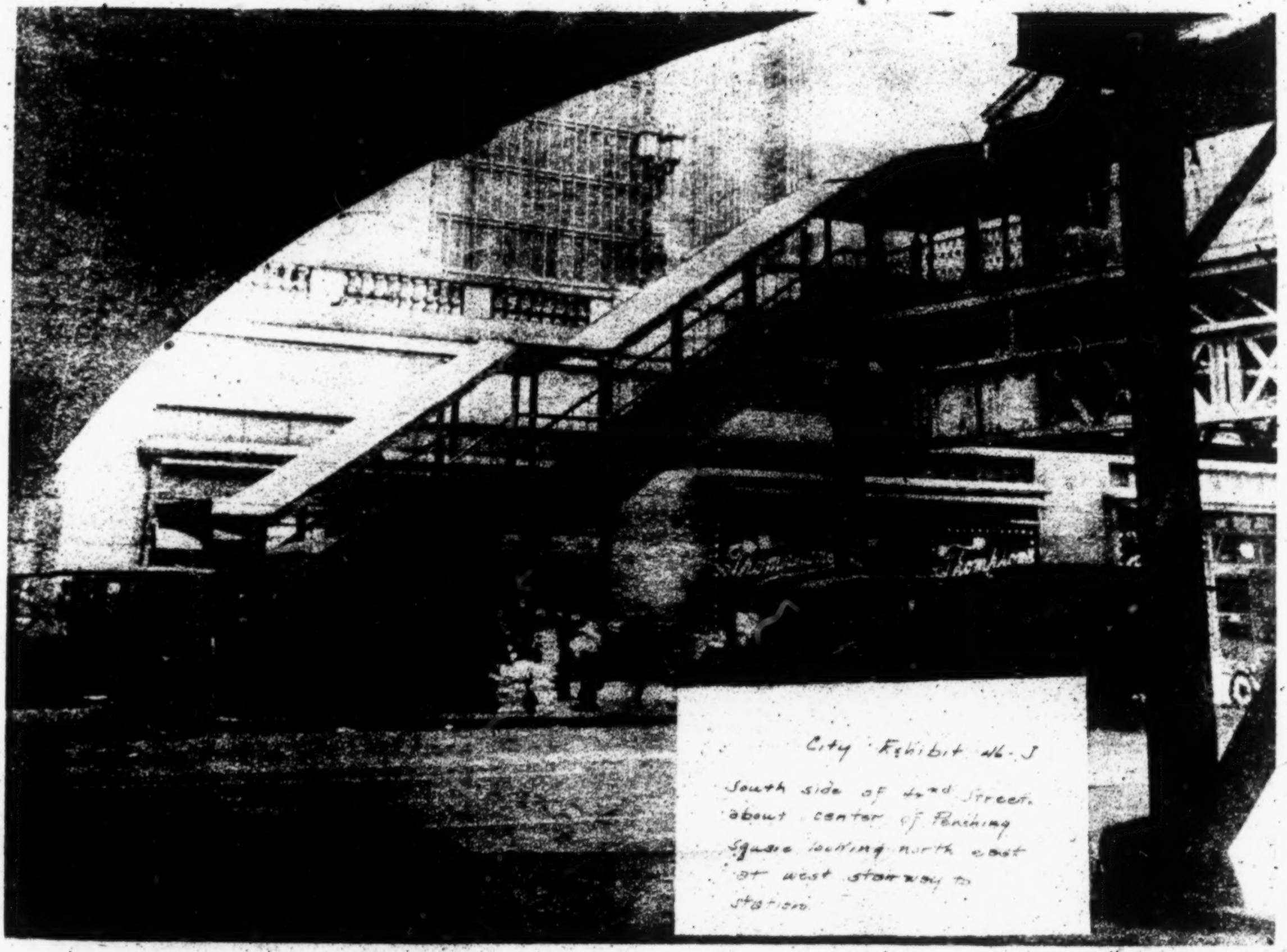
City Exhibit 46-H

North side of 42nd Street directly opposite Park Avenue looking east



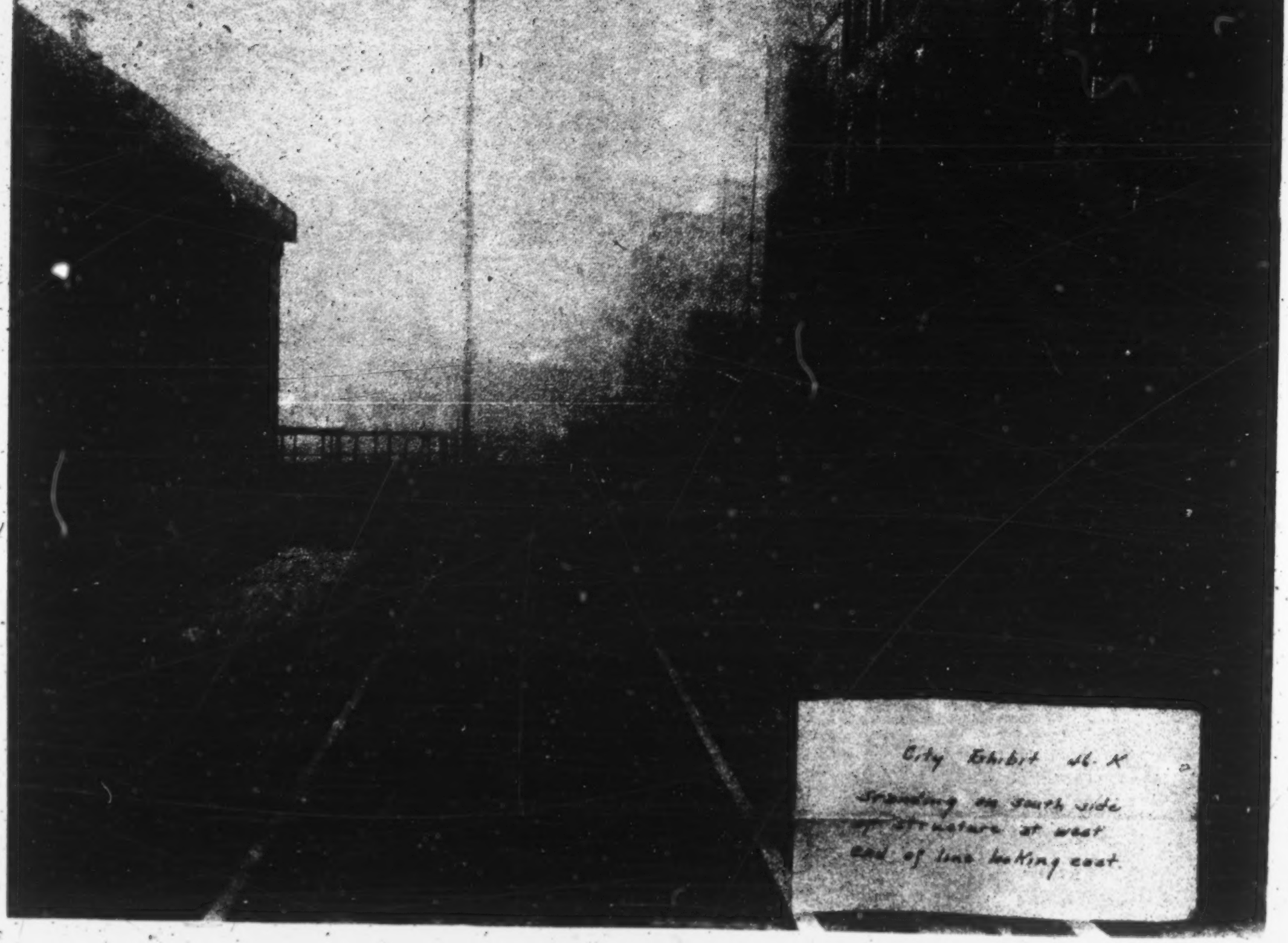
City Exhibit 46-I

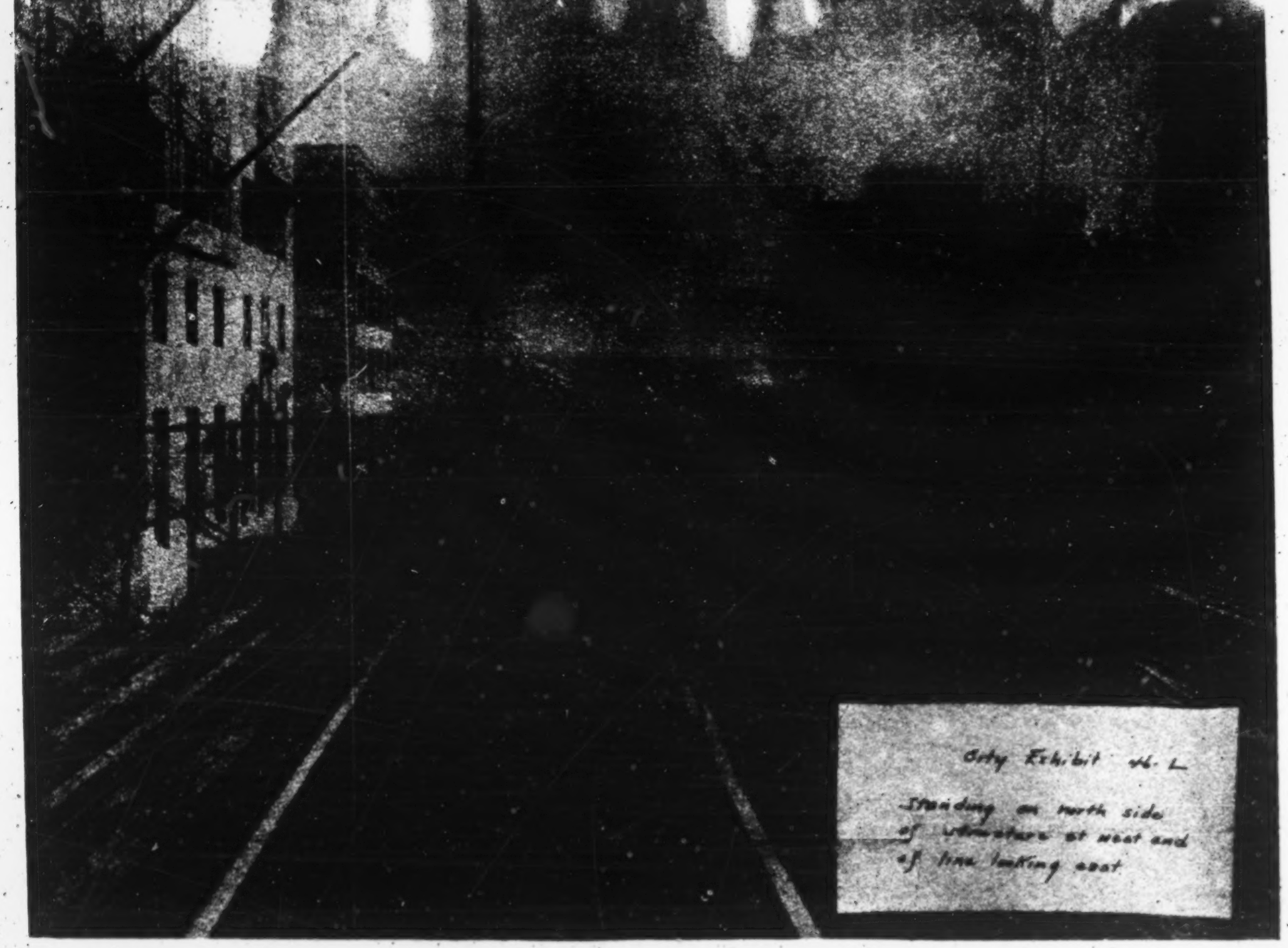
South side of 42nd Street
looking east at south east
corner of 42nd Street
Park Avenue

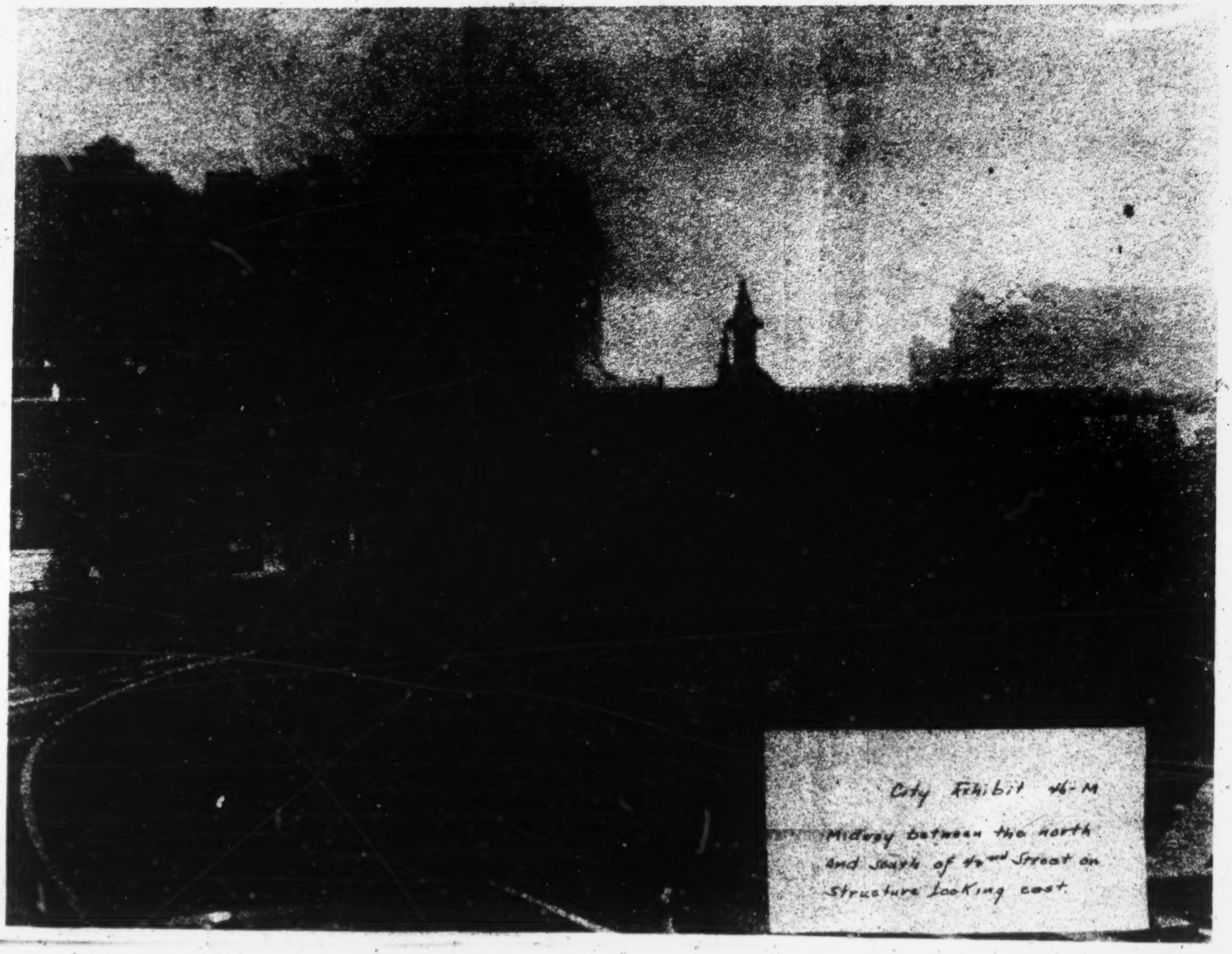


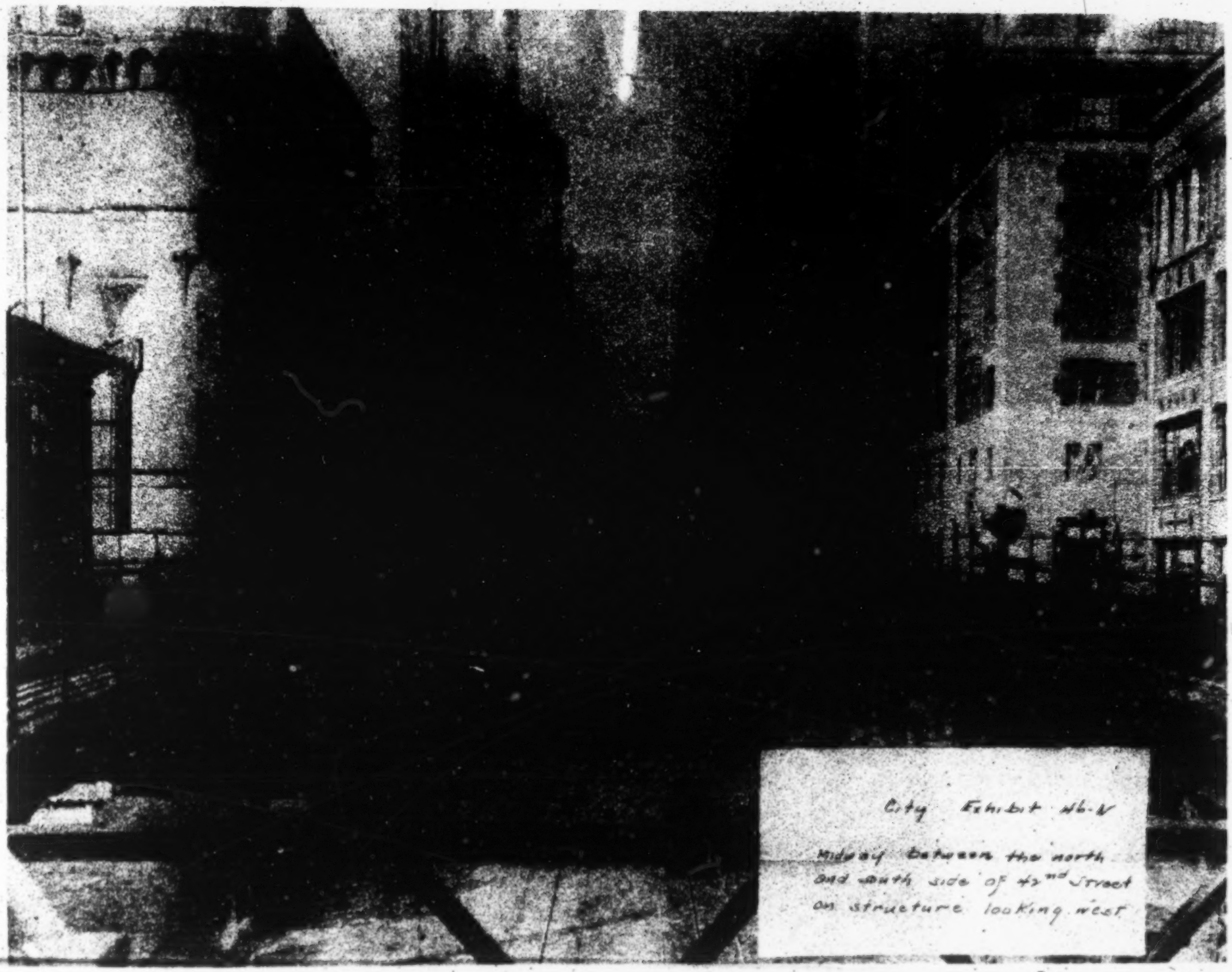
City Exhibit 46-J

South side of 42nd Street about center of Fencing Square looking north east at west stairway to station


City Exhibit #6. K
Standing on south side
of structure at west
end of line looking east.

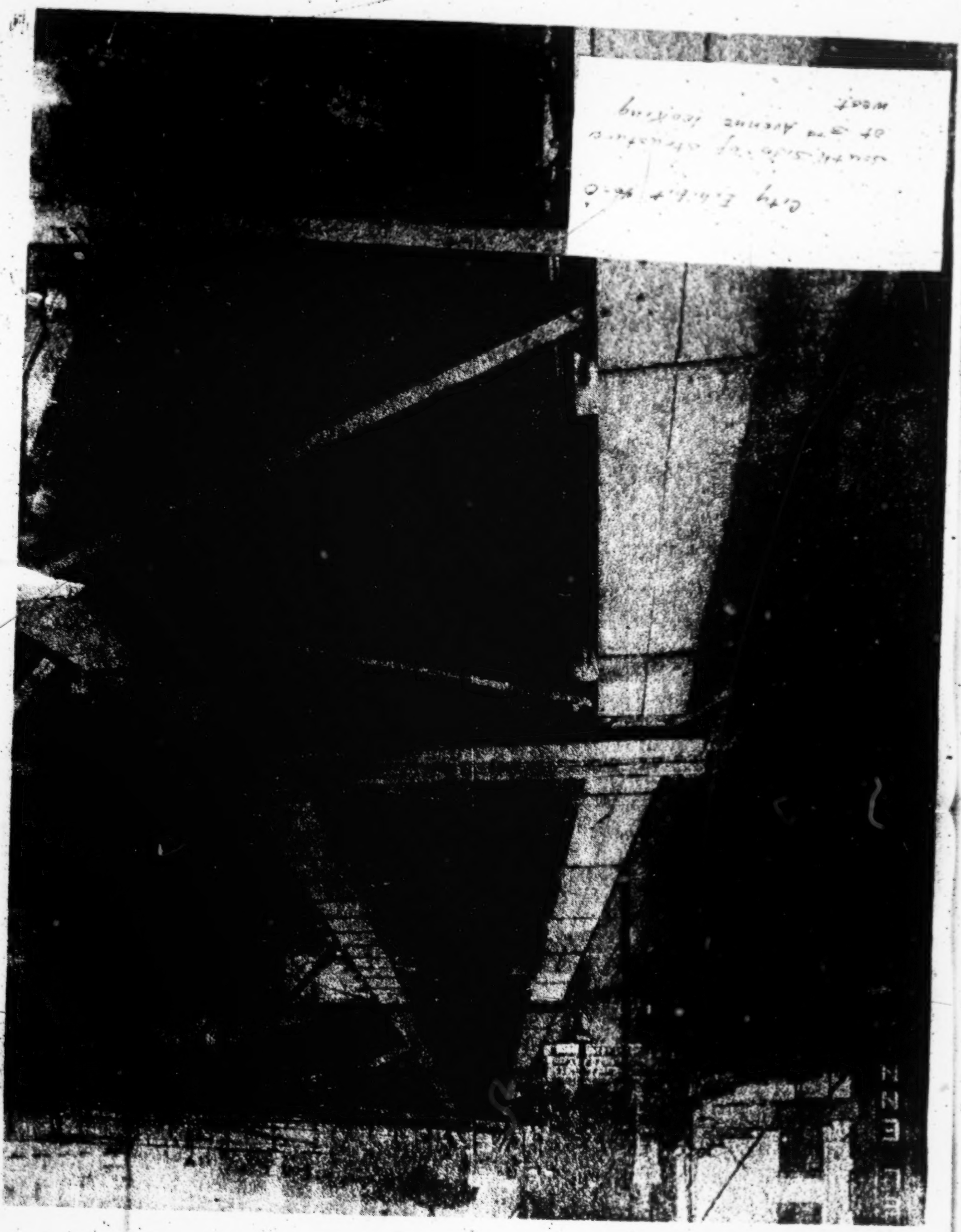

City Exhibit #6. L
Standing on north side
of Wilmothere at west end
of line looking east


City Exhibit #6-M
Midway between the north
and south of the 2nd Street on
Structure looking east.



City Exhibit #6-V

Midway between the north and south side of 42nd Street on structure looking west





City Exhibit 46-P

Bureau of street openings
3rd Ave
Shuttle
42nd Street Structure
On platform north side of
structure looking west

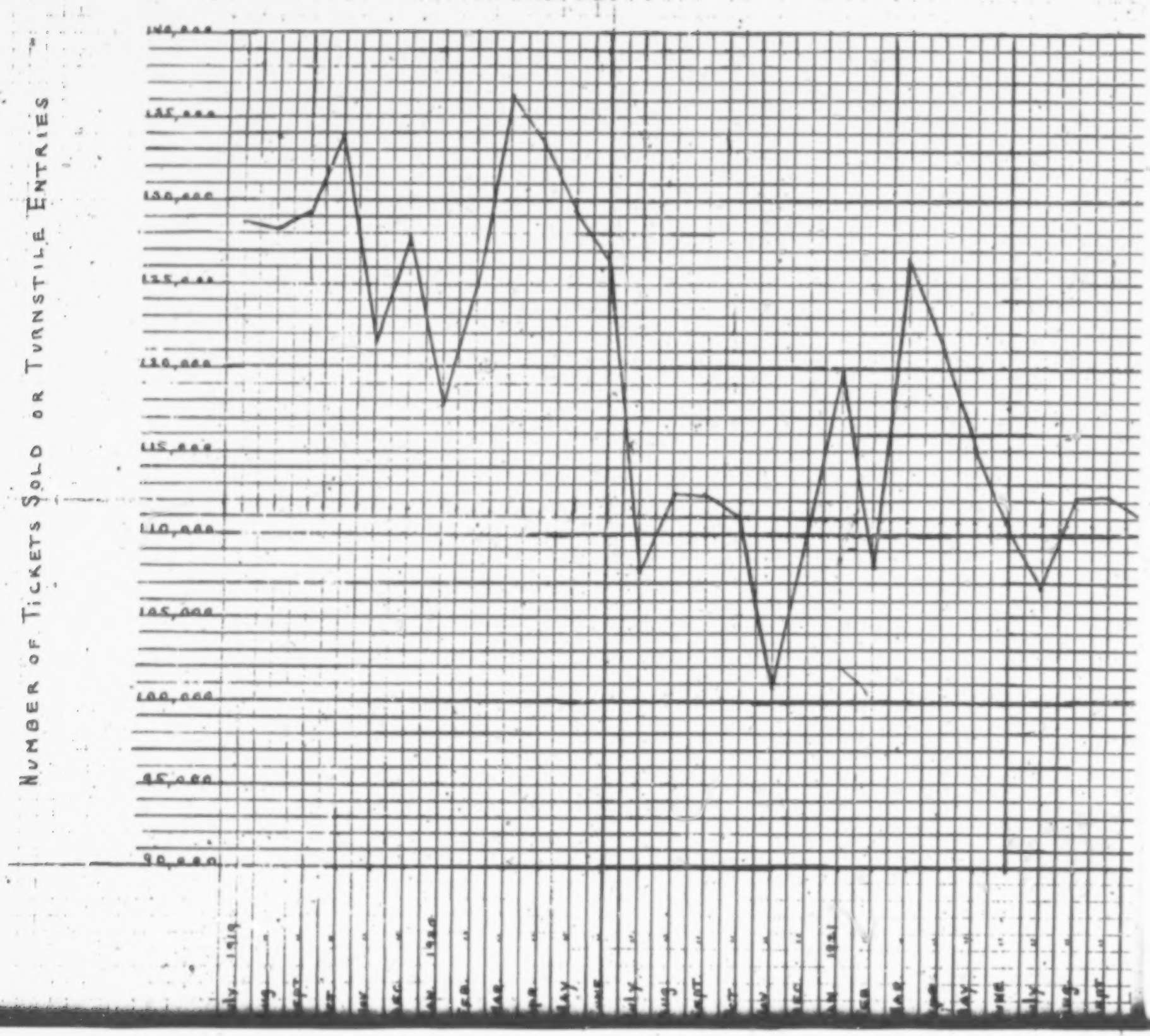
5680

5681

City's Exhibit 58—Chart Showing Monthly Ticket Sales or Turnstile Entries at the Grand Central Station of the Elevated Division of the Interborough Rapid Transit Company Registered July, 1919 to Demolition, Prepared by John Bauer.

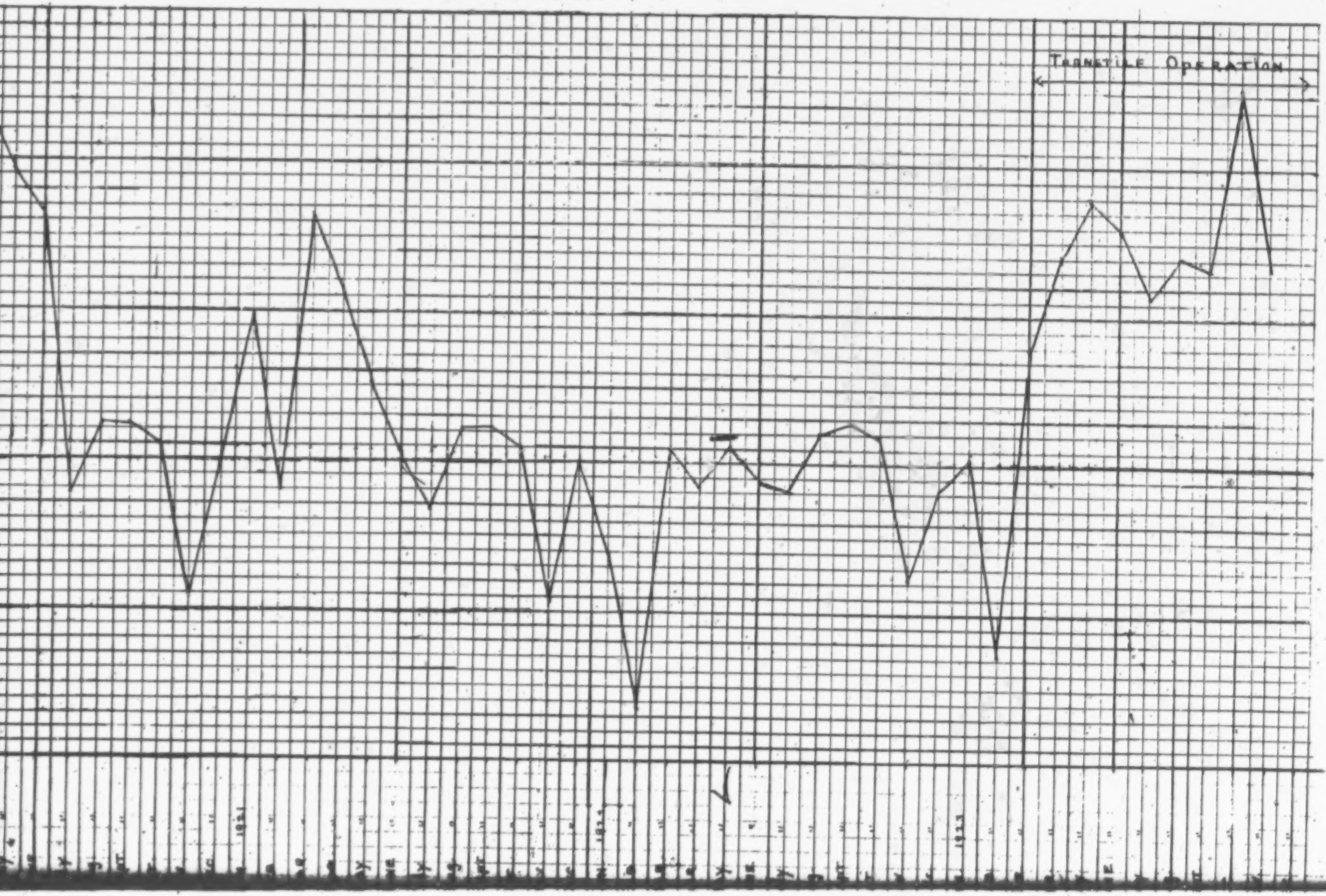
5682

INTERBOROUGH RAPID TRANS
ELEVATED DIVISI
GRAND CENTRAL S
MONTHLY TICKET SALES OR TURNS
JULY, 1919 TO DE



INTERBOROUGH RAPID TRANSIT COMPANY
ELEVATED DIVISION
GRAND CENTRAL STATION
MONTHLY TICKET SALES OR TURNSTILE ENTRIES REGISTERED
JULY, 1919 TO DEMOLITION

CITY EXHIBIT 58

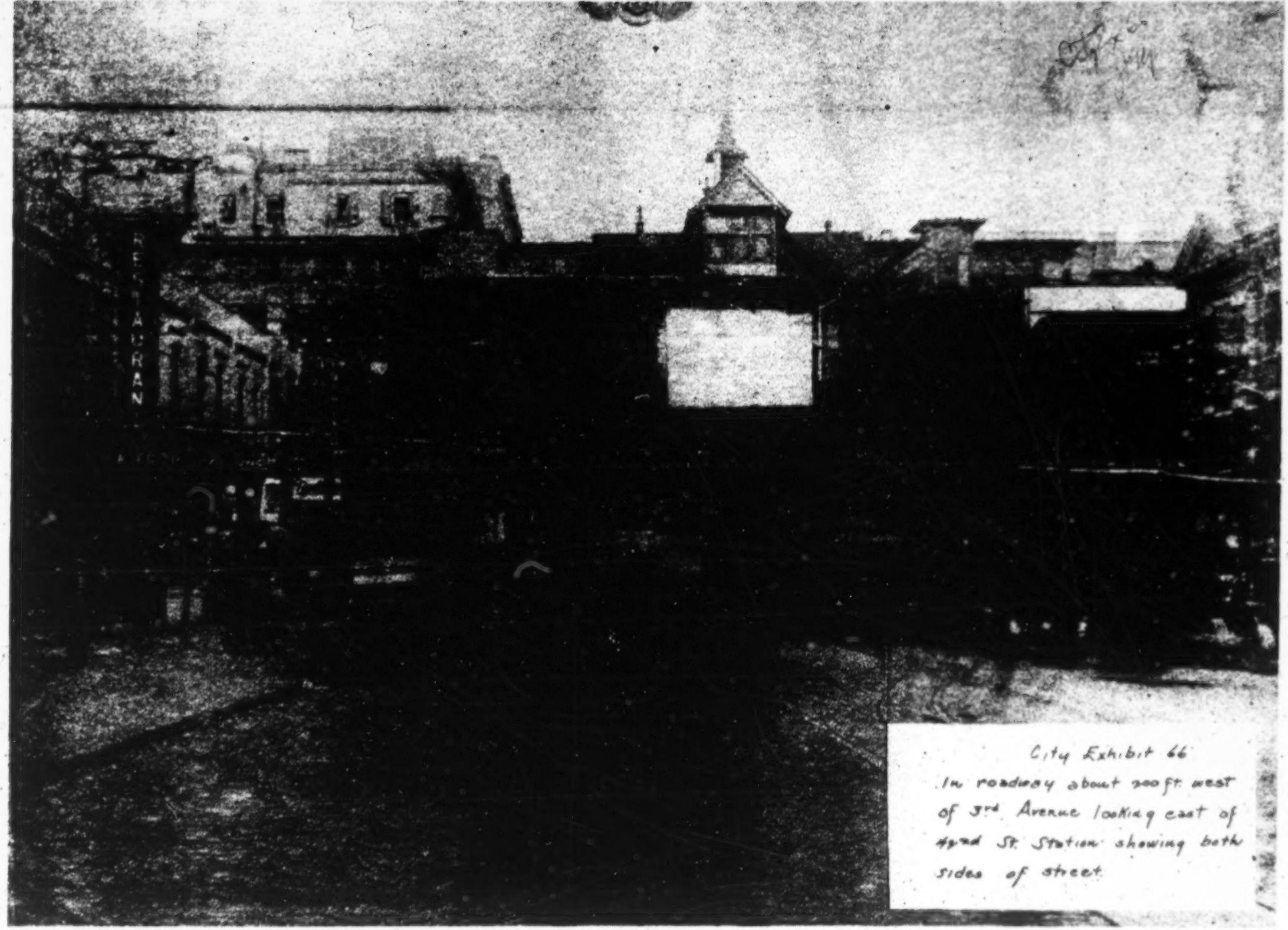


5686

5687

City's Exhibit 66—Photograph Taken in Roadway About 200 Feet West of 3rd Avenue Looking East of 42nd Street Station Showing the Station of the Third Avenue Elevated Road at 42nd Street After the Removal of the Spur but Before the Station Improvements Had Been Made.

5688



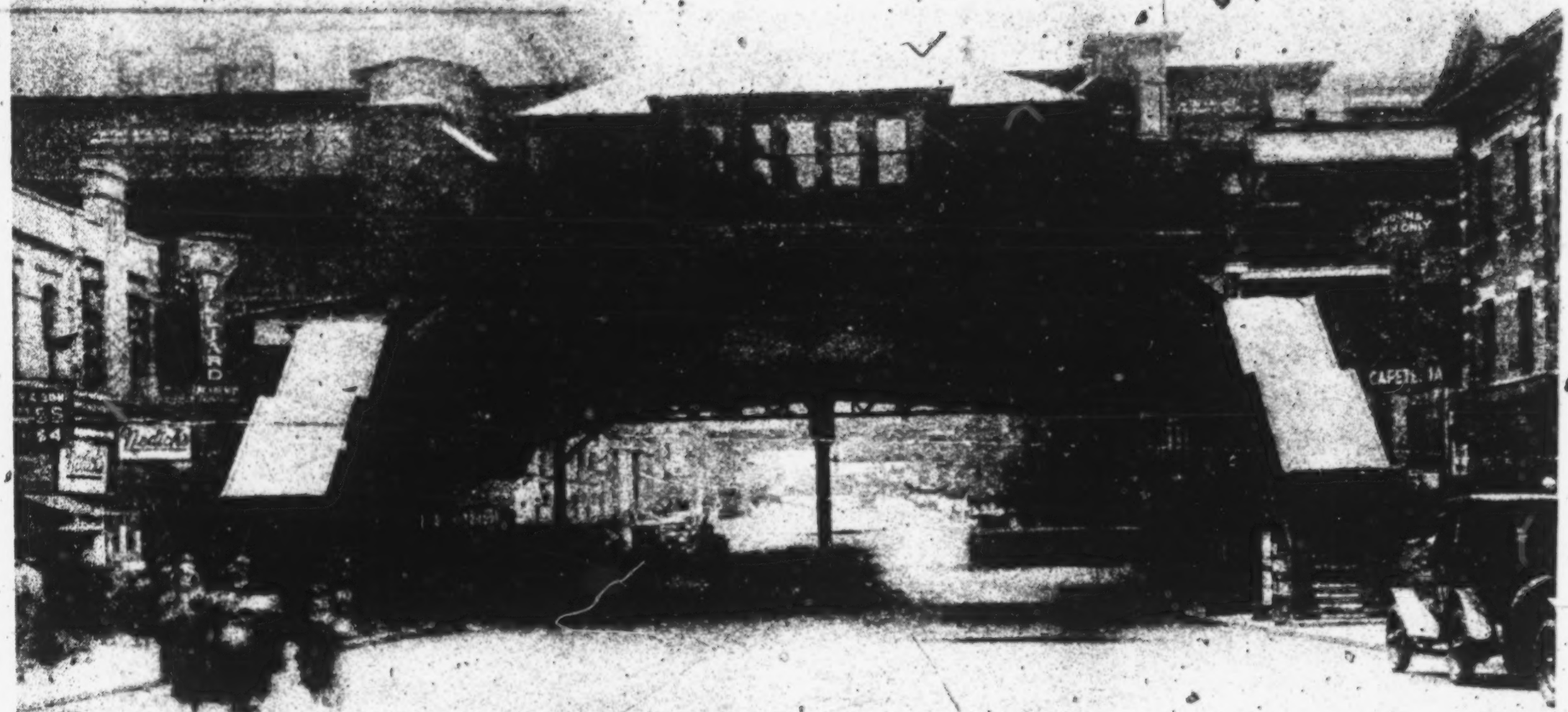
City Exhibit 66
In roadway about 200 ft. west of 3rd. Avenue looking east of 42nd St. Station showing both sides of street

5692

5693

City's Exhibit 67—Photograph Taken from West Looking East Showing the Station of the Third Avenue Elevated Road at 42nd Street After the Station Improvements Had Been Made.

5694



City Exhibit 67
Steinberg's Photos
2 W. 170 St.

From west looking east showing 174th Street 3rd Avenue elevated station.

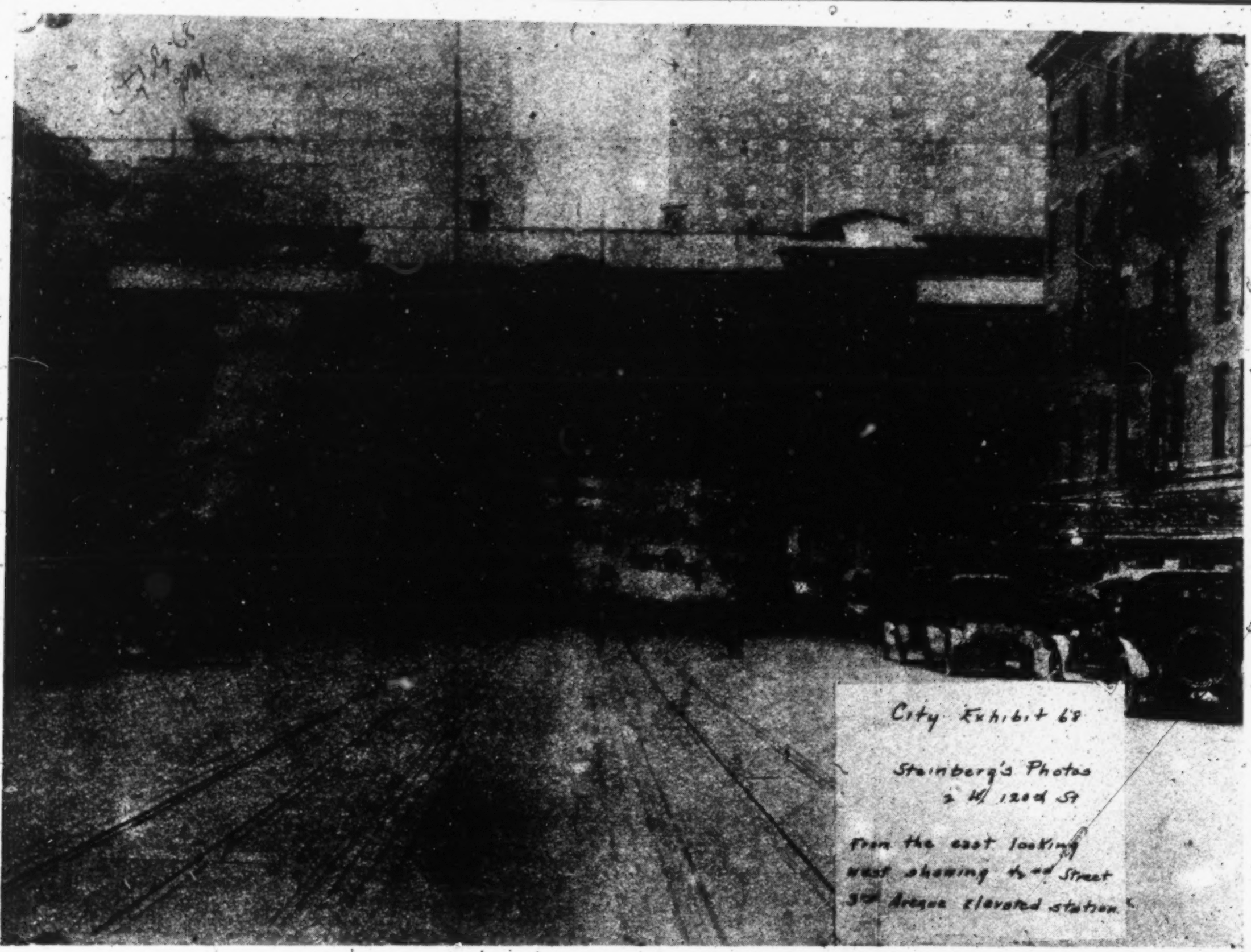
1900

5698

5699

City's Exhibit 68—Photograph Taken from East Looking West Showing the Station of the Third Avenue Elevated Road at 42nd Street After the Stairway at the Northeast Corner Had Been Constructed.

5700



City Exhibit 68

Steinberg's Photos
2 W 120th St

From the east looking
west showing third Street
3rd Avenue elevated station.

1902

5704

5705

Claimants' Exhibit "D"—Plan Showing Route of New York Elevated R. R. in 42nd Street, Between 3rd Avenue and Grand Central Station, Together With Location of Columns, Tracks, Turnouts, Stations, Platforms, Stairways, Etc.: Approved as Per Resolution on December 30th, 1879.

5706

N.Y.E.R.R.

42nd St. Branch

~~Scale~~
~~1" = 1'~~

Avenue

Station

TANK HOUSE

Fourth

(C)

Plan showing route of New York Elevated
in 42nd St. between 3rd Ave. & Grand Centr
together with location of Columns, Tracks, Turnouts, Sta
Plan and Map approved as per Resolution
of this date. Dec. 30th A.D. 1879

James Matthews
J.S. Greer
F.J. Tillman
} Comrs.

Avenue

42nd Street

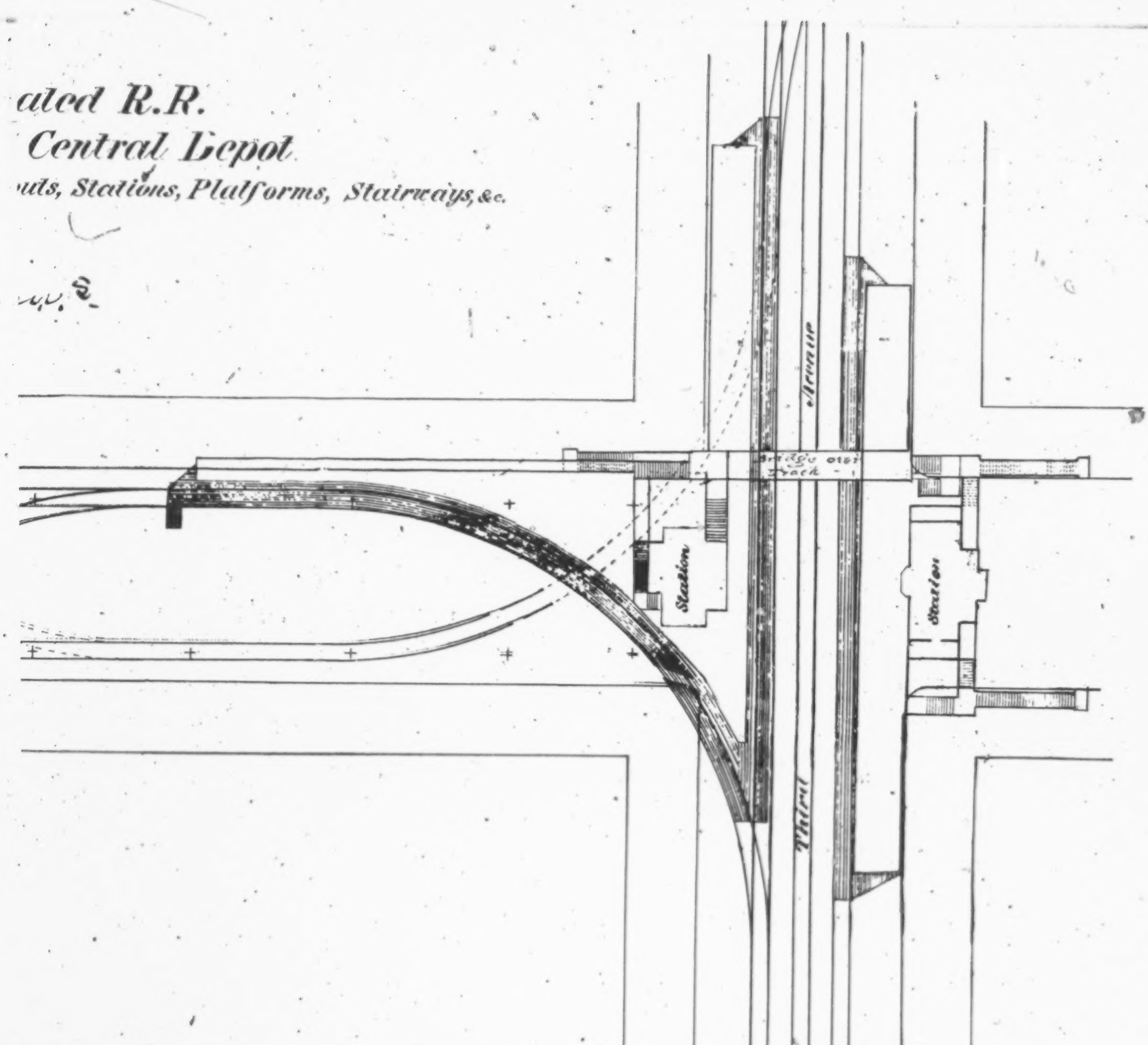
Lexington

Claimant's Exh 'D'

ated R.R.

Central Depot

uts, Stations, Platforms, Stairways, &c.



1904

5710

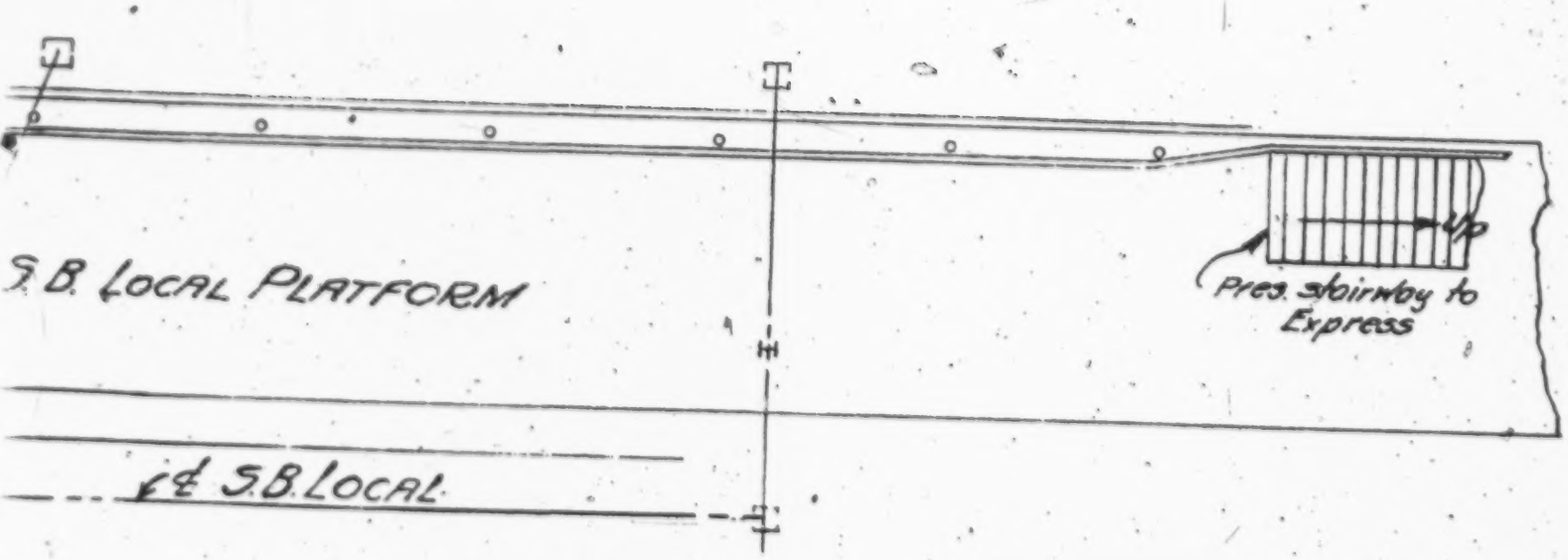
5711

Claimants' Exhibit "G"—Proposed Plan of Station at 42nd Street Account of Removal of 42nd Street Branch (Drawing No. 22941), Dated August 22, 1923.

5712

BUILDING LINE

N



℄ Bent 511 E

3RD AVENUE

℄ EXPRESS (Above)

℄ N.B. LOCAL

B. LOCAL PLATFORM

Pres. stairway to Express

Up

Up

New stairway from street

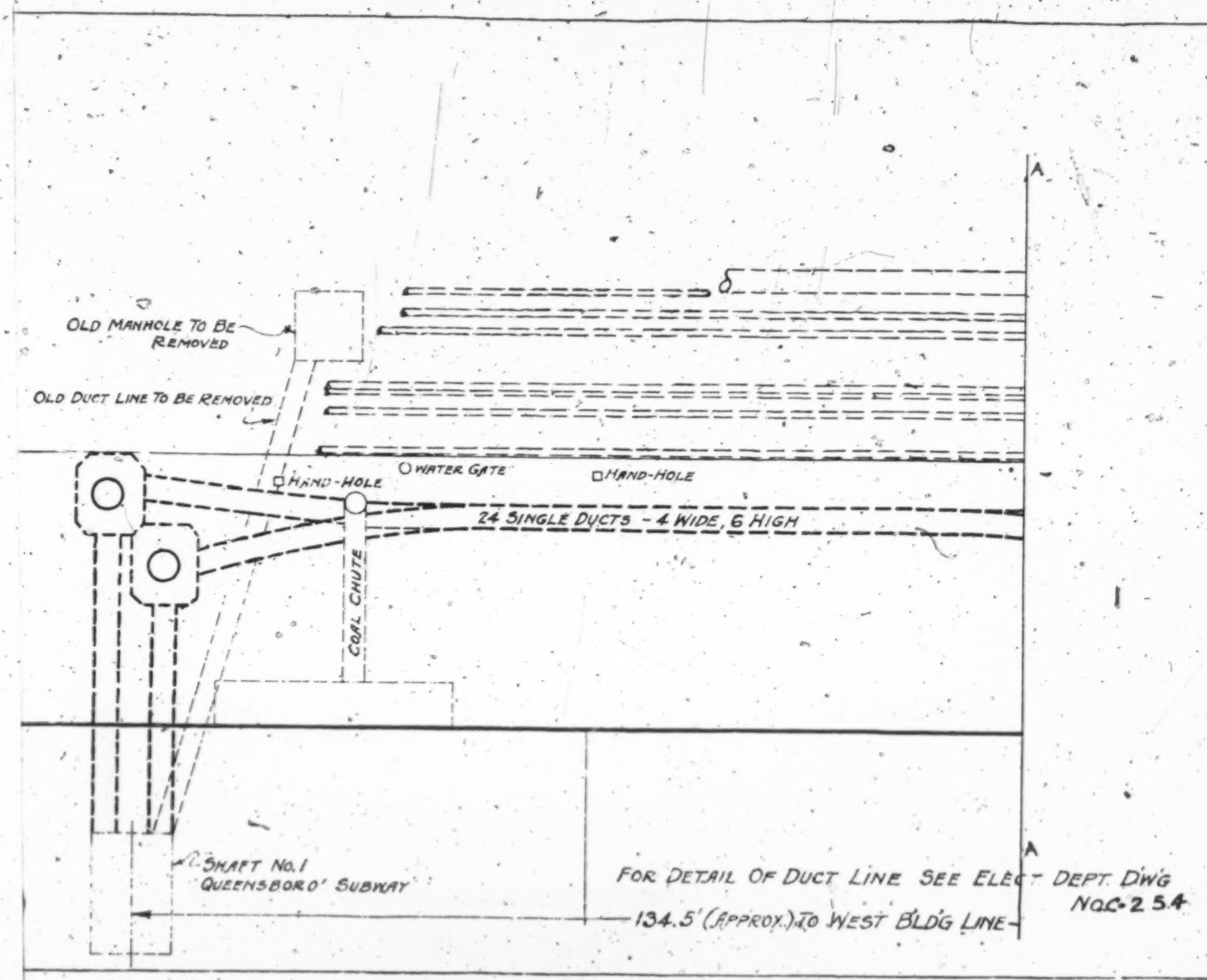
OLD MANHOLE TO BE REMOVED

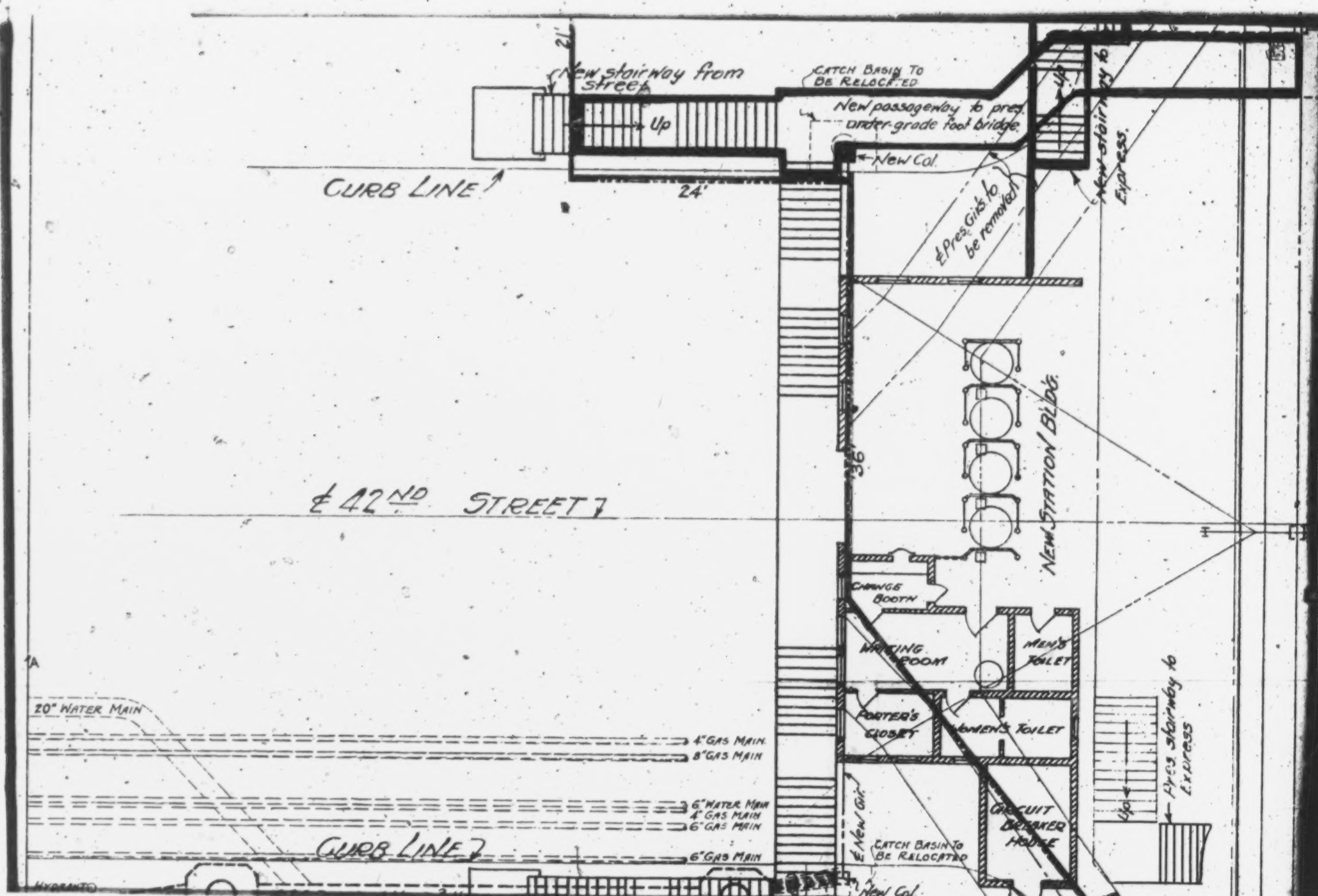
OLD DUCT LINE TO BE REMOVED

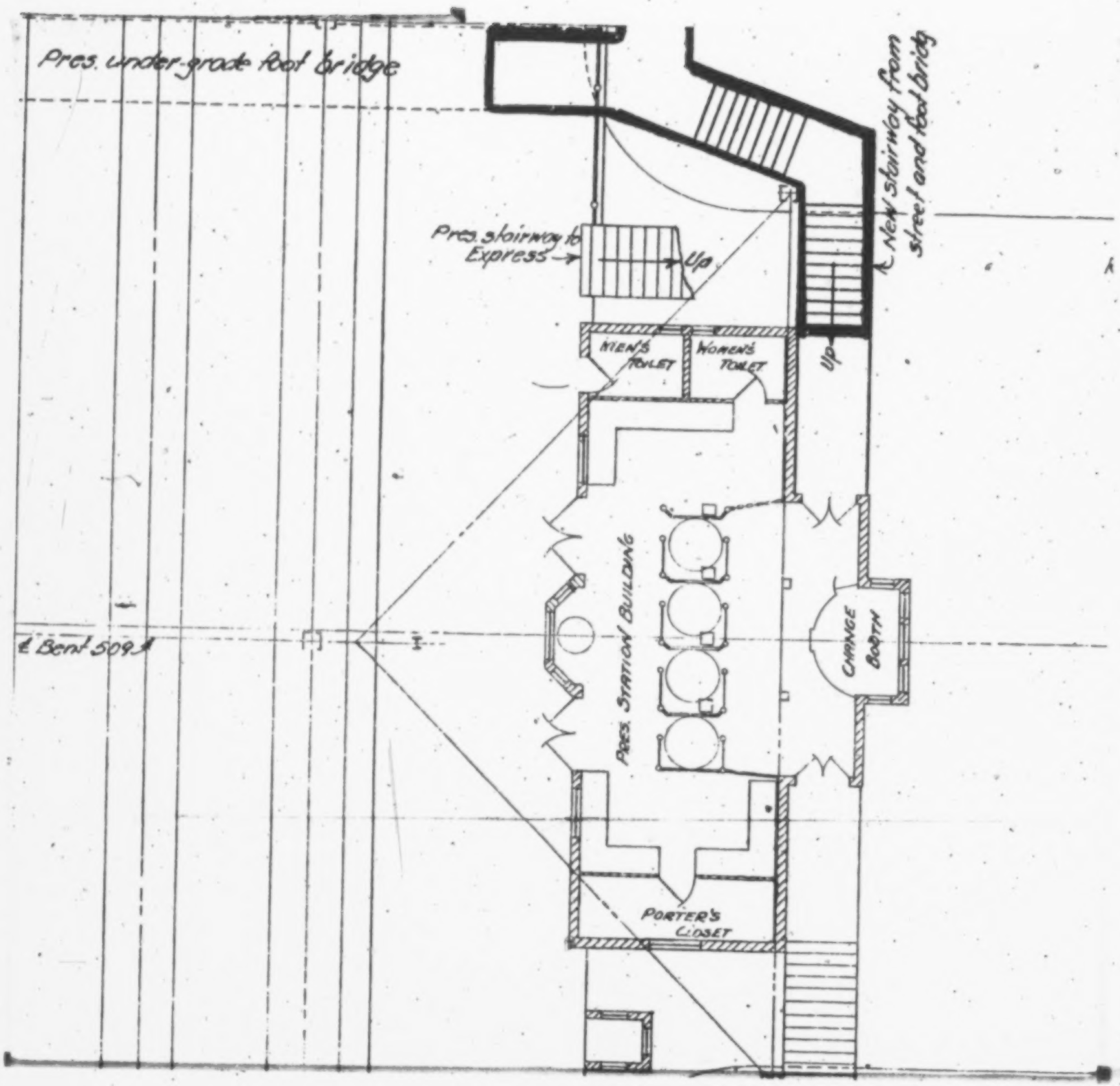
HAND-HOLE

COAL CHUTE

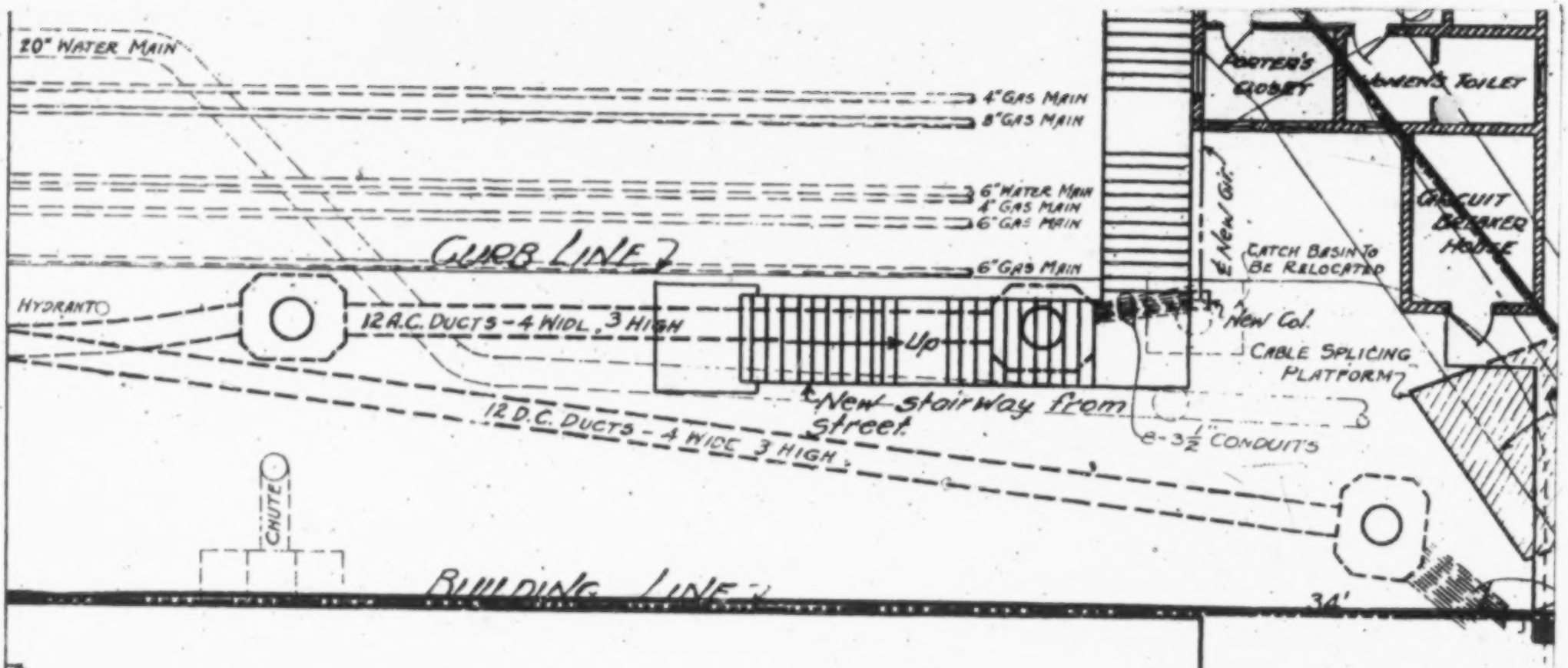
SHAFT No. 1 QUEENSBORO SUBWAY


A
δ
OLD MANHOLE TO BE REMOVED
OLD DUCT LINE TO BE REMOVED
HAND-HOLE
WATER GATE
HAND-HOLE
24 SINGLE DUCTS - 4 WIDE, 6 HIGH
COAL CHUTE
SHAFT No. 1
QUEENSBORO' SUBWAY
FOR DETAIL OF DUCT LINE SEE ELEC'T DEPT. DWG NQC-254
134.5' (APPROX.) TO WEST BLDG LINE
A


New stairway from street
21'
Up
CATCH BASIN TO BE RELOCATED
New passageway to pres. under-grade foot bridge
New Col.
CURB LINE
24'
& Pres. Girts to be removed
New stairway to Express.
42ND STREET
36'
NEW STATION BLDG.
CHANGE BOOTH
WAITING ROOM
MEN'S TOILET
PORTER'S CLOSET
WOMEN'S TOILET
CIRCUIT BREAKER HOUSE
New Girt
CATCH BASIN TO BE RELOCATED
New Col.
Up
Pres. stairway to Express
20" WATER MAIN
4" GAS MAIN
8" GAS MAIN
6" WATER MAIN
4" GAS MAIN
6" GAS MAIN
CURB LINE
6" GAS MAIN
HYDRANT


Pres. under-grade foot bridge
℄ Bent 509.4
Pres. stairway to Express
Up
New stairway from street and foot bridg
MEN'S TOILET
WOMEN'S TOILET
Up
PRES. STATION BUILDING
CHANGE BOOTH
PORTER'S CLOSET

REVISED SEPT. 15, 1923 - DOTTED LINES, AS SHOWN ON "DRAFT DAMAGE MAP" ADDED.
OLD DUCTS SHOWN TO BE REMOVED AND NEW DUCT LINES, REQUIRED FOR CABLES REMOVED FROM 42nd ST. BRANCH, ADDED.
CATCH BASINS SHOWN TO BE RELOCATED.



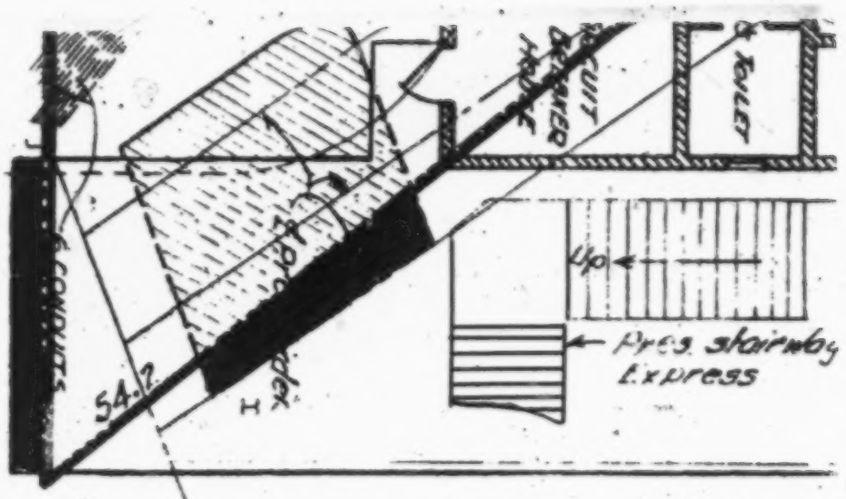
Prescribed line within which area structures are to be removed - shown in blue -

New & additional structures where Manhattan Ry. Co. has a franchise " " red

" " " " & structures in place where Manhattan Ry. Co } - Yellow -
has no franchise

O.G.B.

HOW-

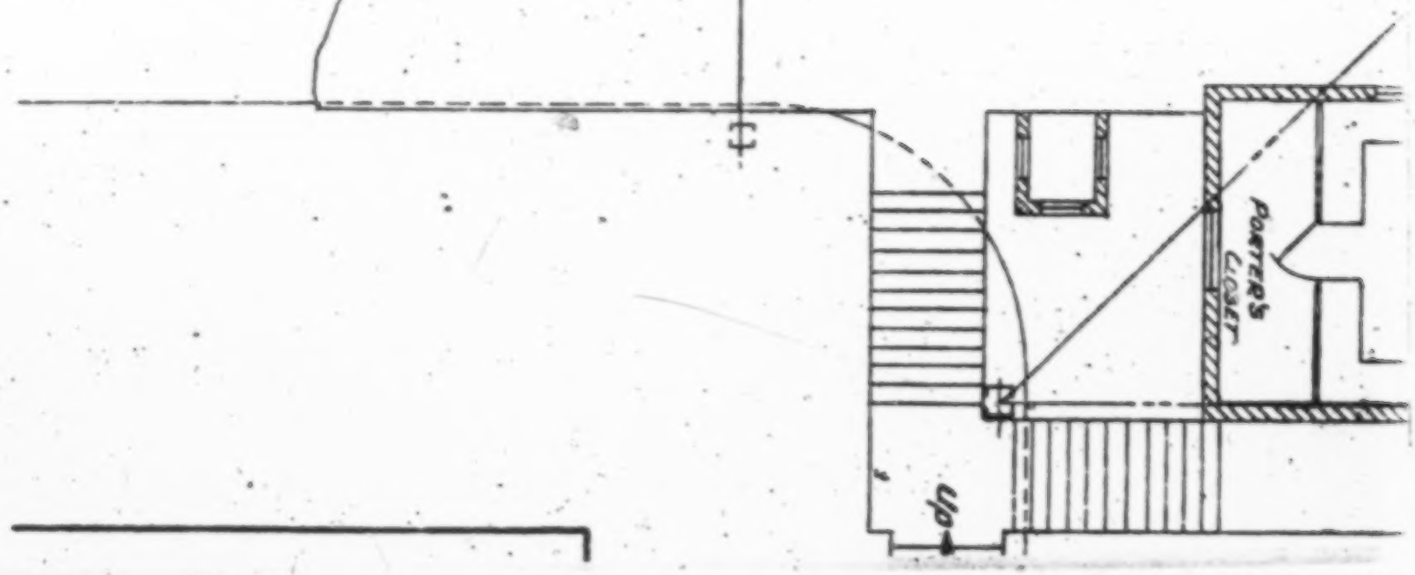


℄ Bent 30E2

NEW HOUSE FOR TRACKMEN (Under Express Tracks)

4'0"

℄ Bent 30E3





Note:-
Light lines indicate present construction to be retained.
Heavy lines indicate new construction.
——·—— Indicates the prescribed area, copied from draft damage map entitled "In the matter of acquiring title by the City of New York to said rights & structures etc., dated Dec. 28, 1921 - file no. 4316, acc. no. 2438 - N.Y. City file.

Claimant's Exh. - 'G'

INTERBOROUGH RAPID TRANSIT CO.
MANHATTAN RAILWAY DIVISION
3rd AVE. LINE
Proposed plan of station at 42nd St.
account of removal of 42nd St. Branch.
CHIEF ENGINEER'S OFFICE - N.Y. AUG. 22, 1923
Scale:- 8 in = 1 ft.
DRAWING No. 22941

5716

Claimants' Exhibit "H-1," "H-2," "H-8," "H-9," "H-10," "H-11," "H-16," "H-17," "H-18," "H-19," "H-20," "H-22," "H-23," "H-24," "H-25," "H-32," "H-33," "H-43," "H-44," "H-45" and "H-46"—Twenty-one (21) Photographs of South Side of 42nd Street Showing Structures and Abutting Properties.

Claimants' Exhibit "H-1"—Photograph showing south side of 42nd Street looking east from Park Avenue Viaduct.

Claimants' Exhibit "H-2"—Photograph showing north side of 42nd Street looking east from Park Avenue Viaduct.

Claimant's Exhibit "H-8"—Photograph showing elevated station in front of building #110 to #118 East 42nd Street looking south.

5717 Claimants' Exhibit "H-9"—Photograph showing elevated station and building #100 to #108 East 42nd Street looking south.

Claimants' Exhibit "H-10"—Photograph showing #130 East 42nd Street at southeast corner of Lexington Avenue looking south.

Claimants' Exhibit "H-11"—Photograph showing #134 to #136 East 42nd Street looking south.

Claimants' Exhibit "H-16"—Photograph showing south side of 42nd Street looking east along 42nd Street from Park Avenue.

Claimants' Exhibit "H-17"—Photograph showing Bowery Savings Bank, #110 East 42nd Street, looking south.

Claimants' Exhibit "H-18"—Photograph showing #118-120 East 42nd Street looking south.

Claimants' Exhibit "H-19"—Photograph showing #122-124-126 East

5718 42nd Street looking south.

Claimants' Exhibit "H-20"—Photograph showing southwest corner of 3rd Avenue and 42nd Street looking north.

Claimants' Exhibit "H-22"—Photograph showing building #156-158 East 42nd Street looking south.

Claimants' Exhibit "H-23"—Photograph showing building #152-154 East 42nd Street looking south.

Claimants' Exhibit "H-24"—Photograph showing building #148-150 East 42nd Street looking south.

Claimants' Exhibit "H-25"—Photograph showing #132 East 42nd Street looking south.

Claimants' Exhibit "H-32"—Photograph showing southwest corner of Lexington Avenue and 42nd Street looking southwest.

Claimants' Exhibit "H-33"—Photograph showing southwest corner of Lexington Avenue and 42nd Street looking southeast.

Claimants' Exhibit "H-43"—Photograph showing south side of 42nd Street taken from front of #157 East 42nd Street looking southwest.

Claimants' Exhibit "H-44"—Photograph showing building #146 East 42nd Street looking south.

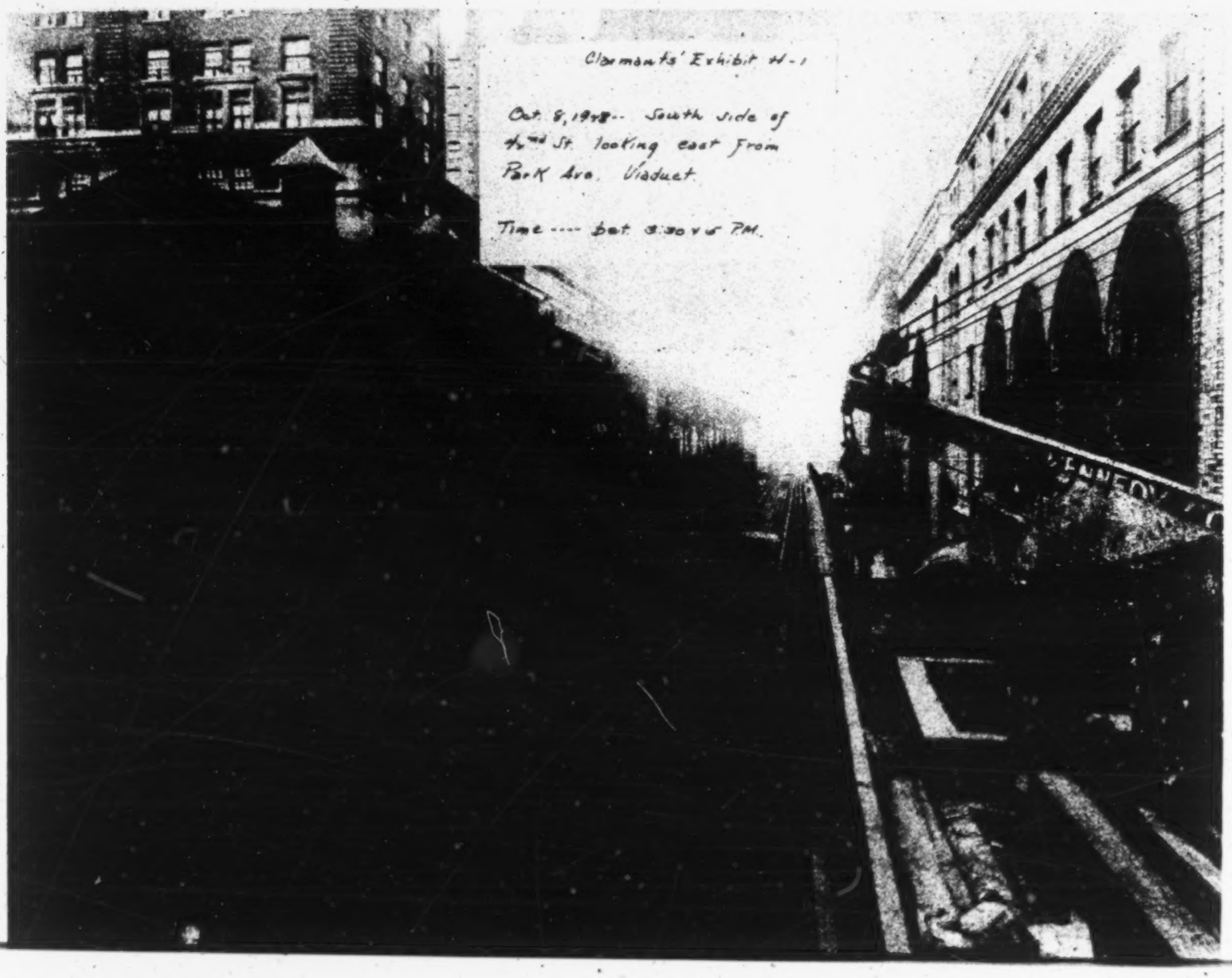
Claimants' Exhibit "H-45"—Photograph showing building #144-142 East 42nd Street looking south.

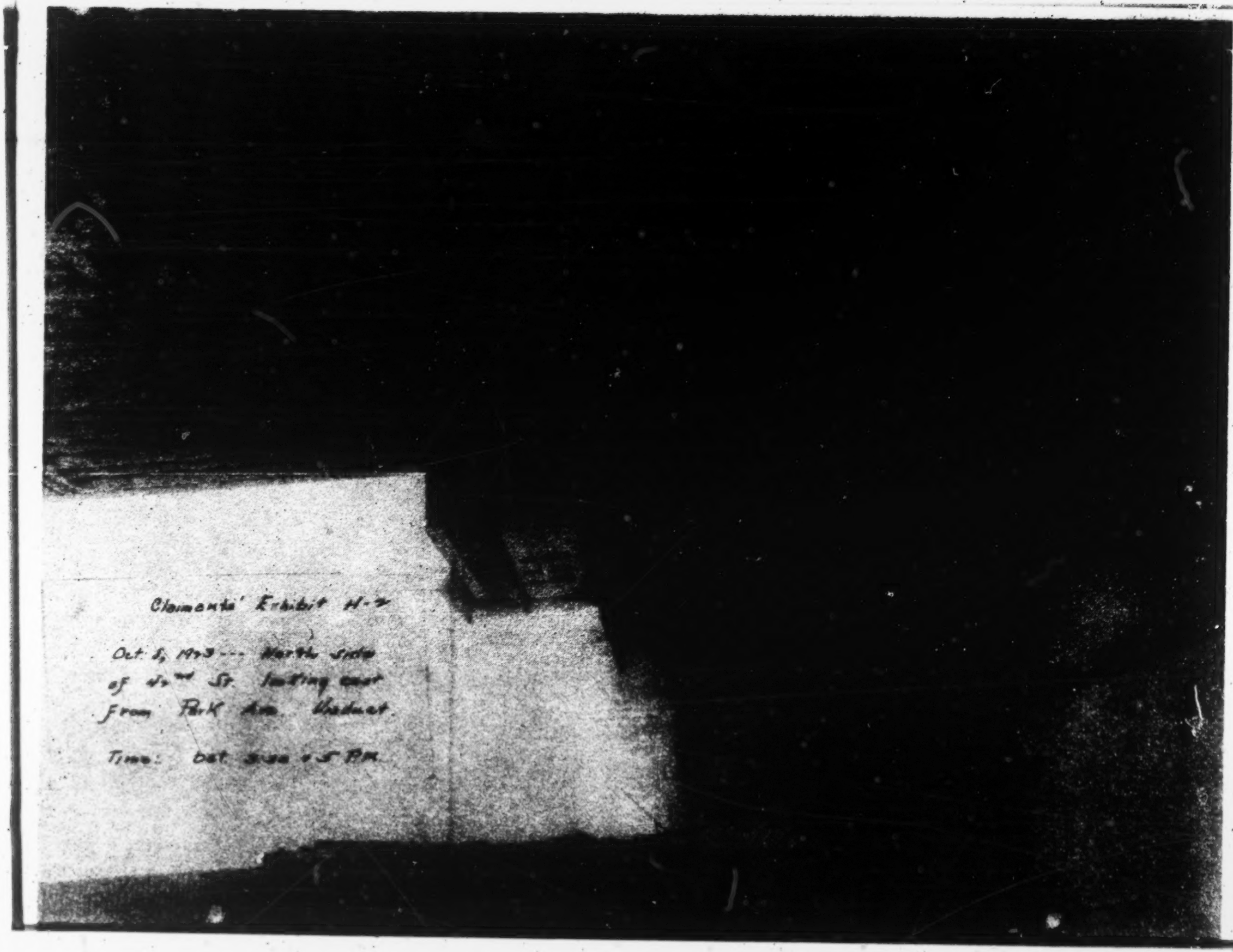
Claimants' Exhibit "H-46"—Photograph showing building #140-138 East 42nd Street looking south.

Claimants' Exhibit W-1

Oct. 8, 1928 -- South side of 47th St looking east from Park Ave. Viaduct

Time ---- bet 3:30 & 5 P.M.




Claimants' Exhibit H-3
Oct. 5, 1923 --- North side
of 42nd St. looking east
From Park Ave. Viaduct.
Time: Oct 3:00 & 5 P.M.

Chicago's Exhibit No. 1

Description of Exhibit

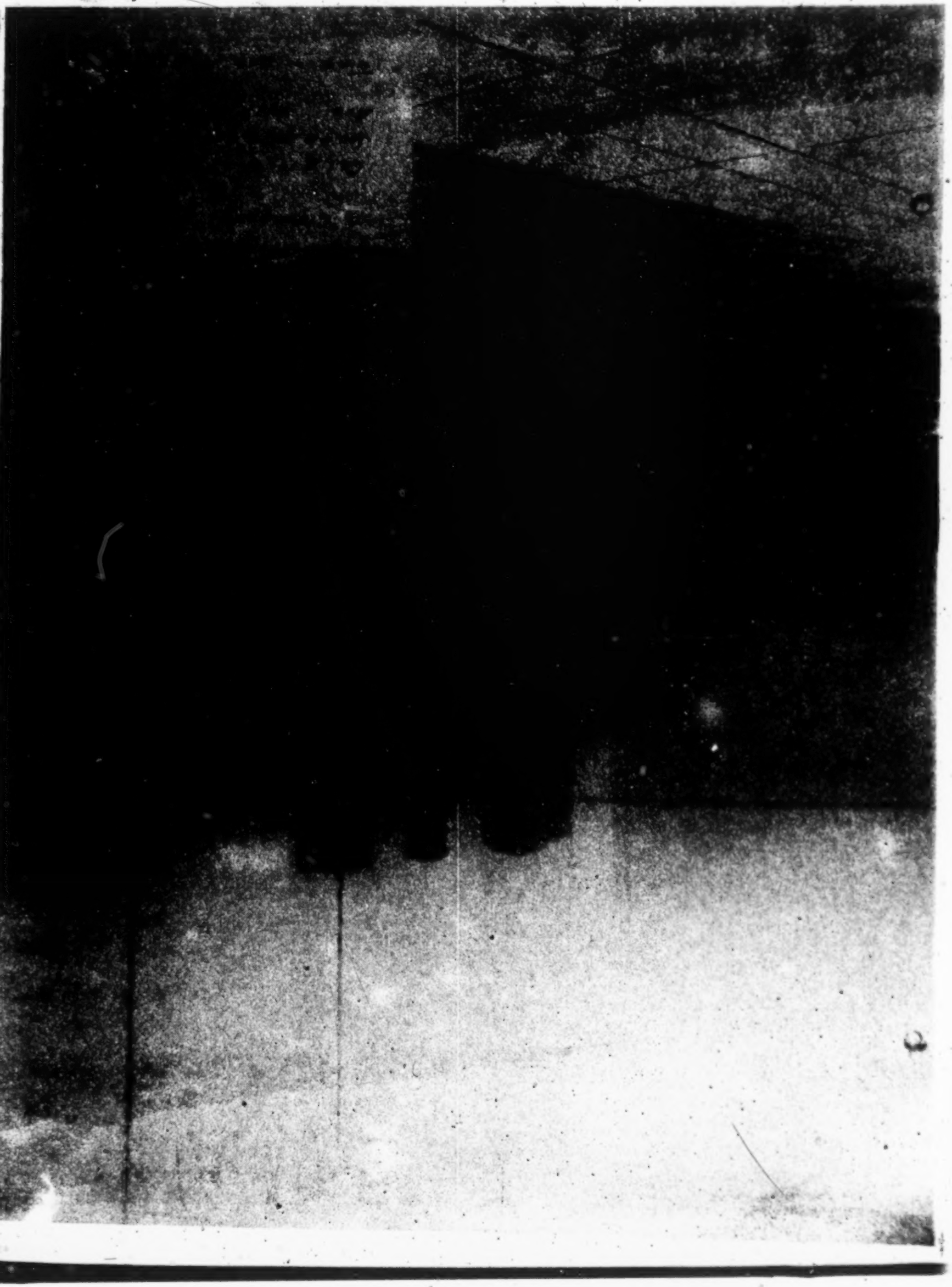
Station front of Building
#110 to #112 E. 43rd St.
looking south.

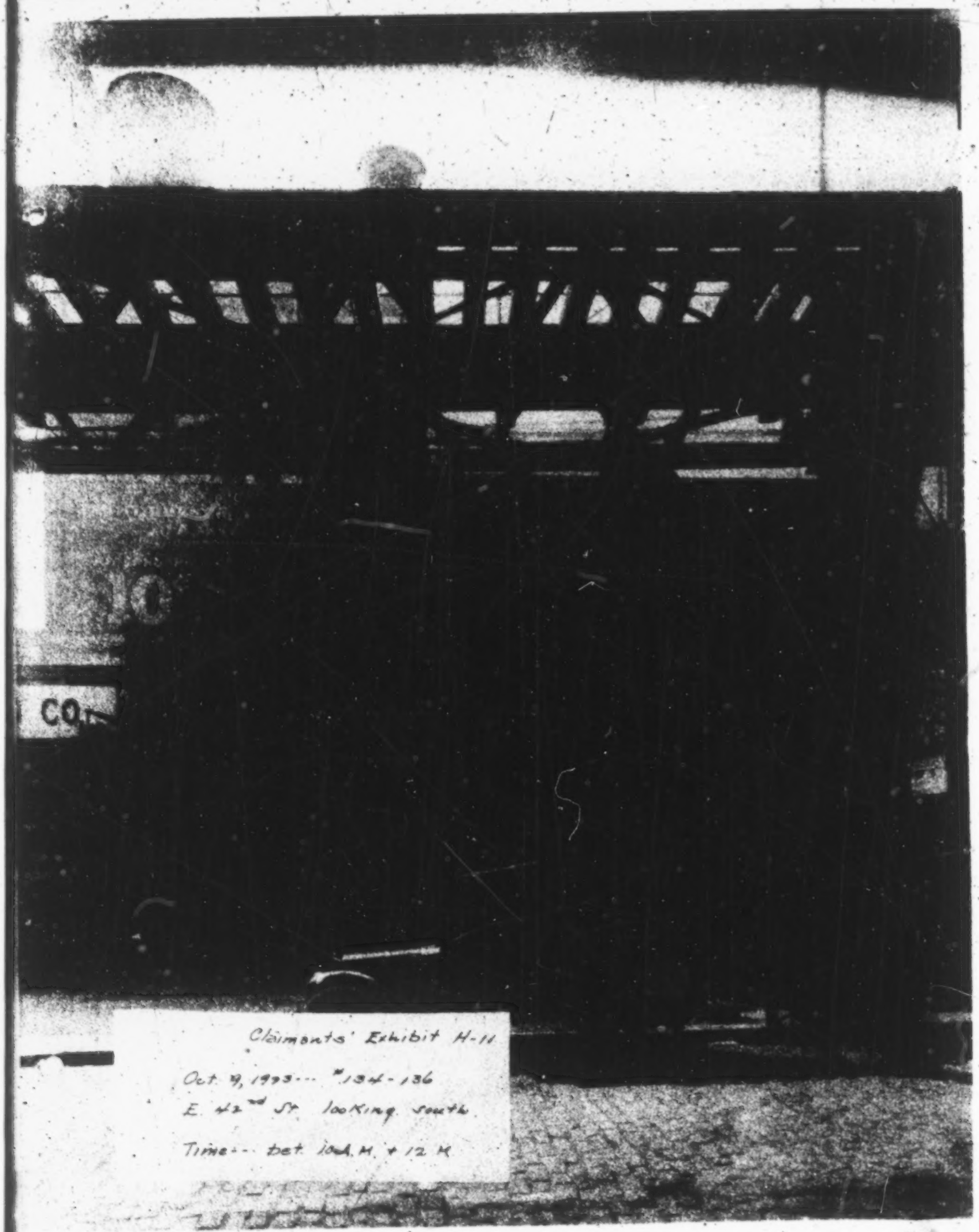
Time--- bet. 3:30 & 5 PM.

Claimants' Exhibit N-9

Oct. 8, 1923 --- Elevated Station and Building #100 - #108 E 42nd St. looking South.

Time -- bet 3:30 & 5 P.M.



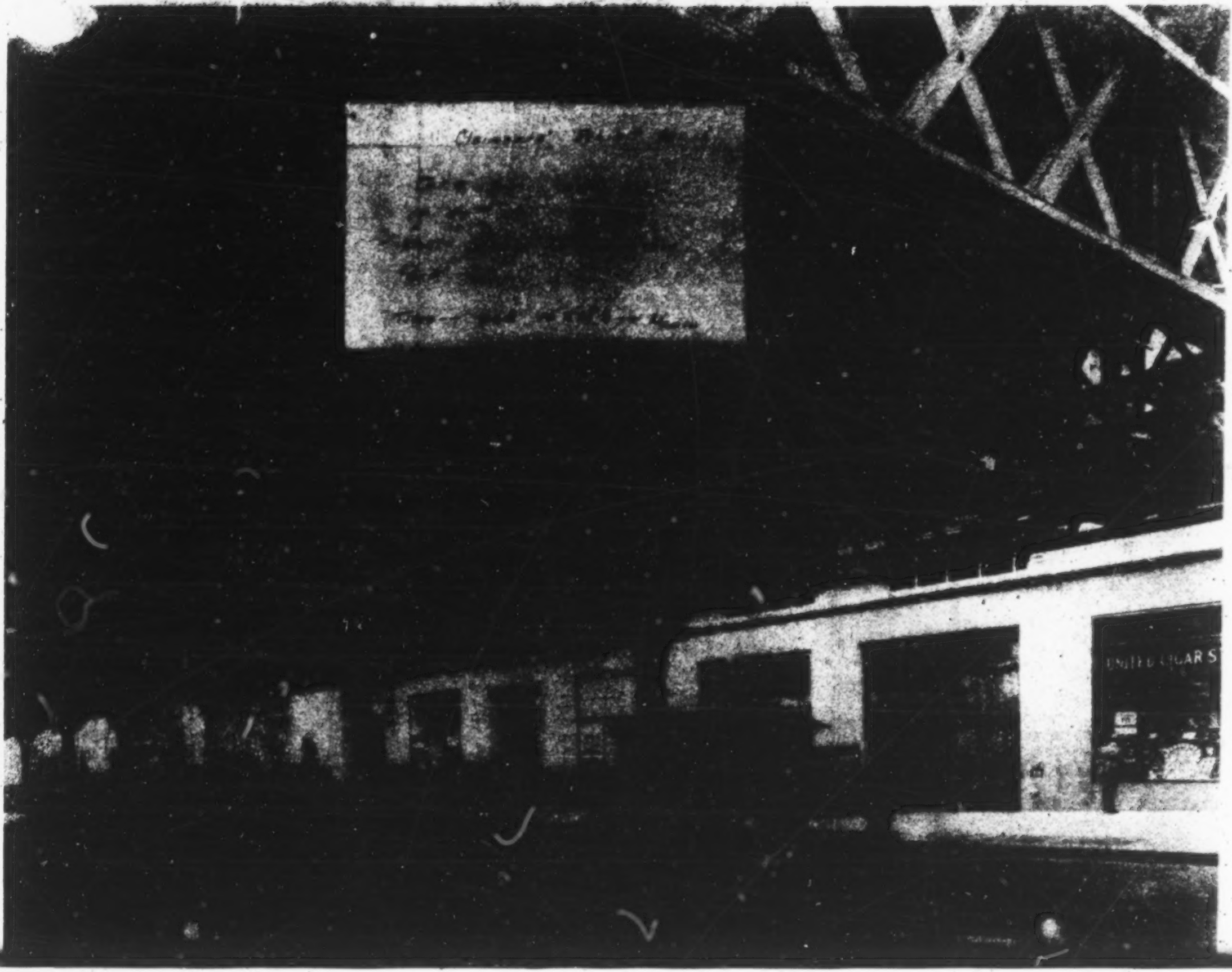


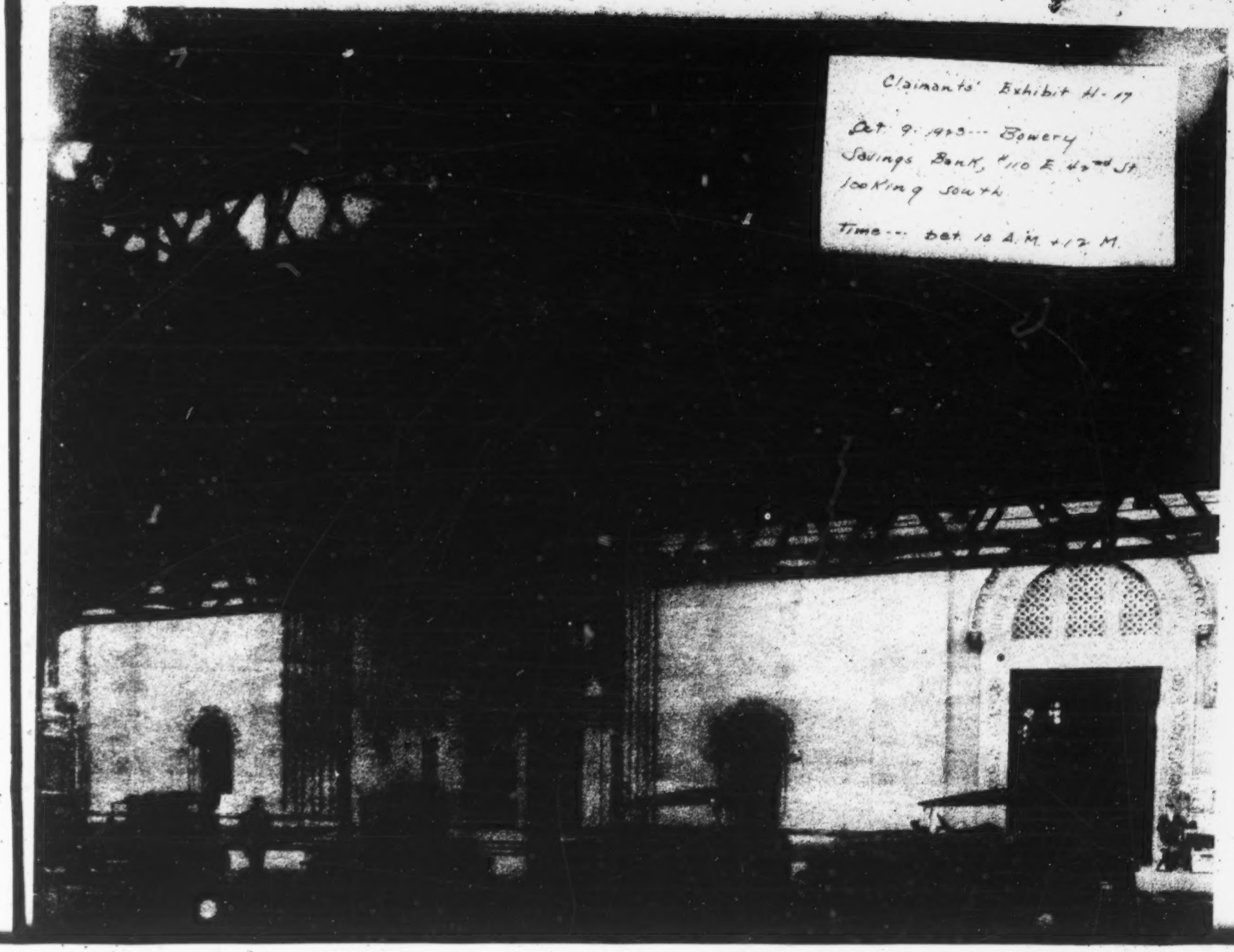
Claimants' Exhibit H-11

Oct. 9, 1923 --- #134-136

E. 42nd St. looking south.

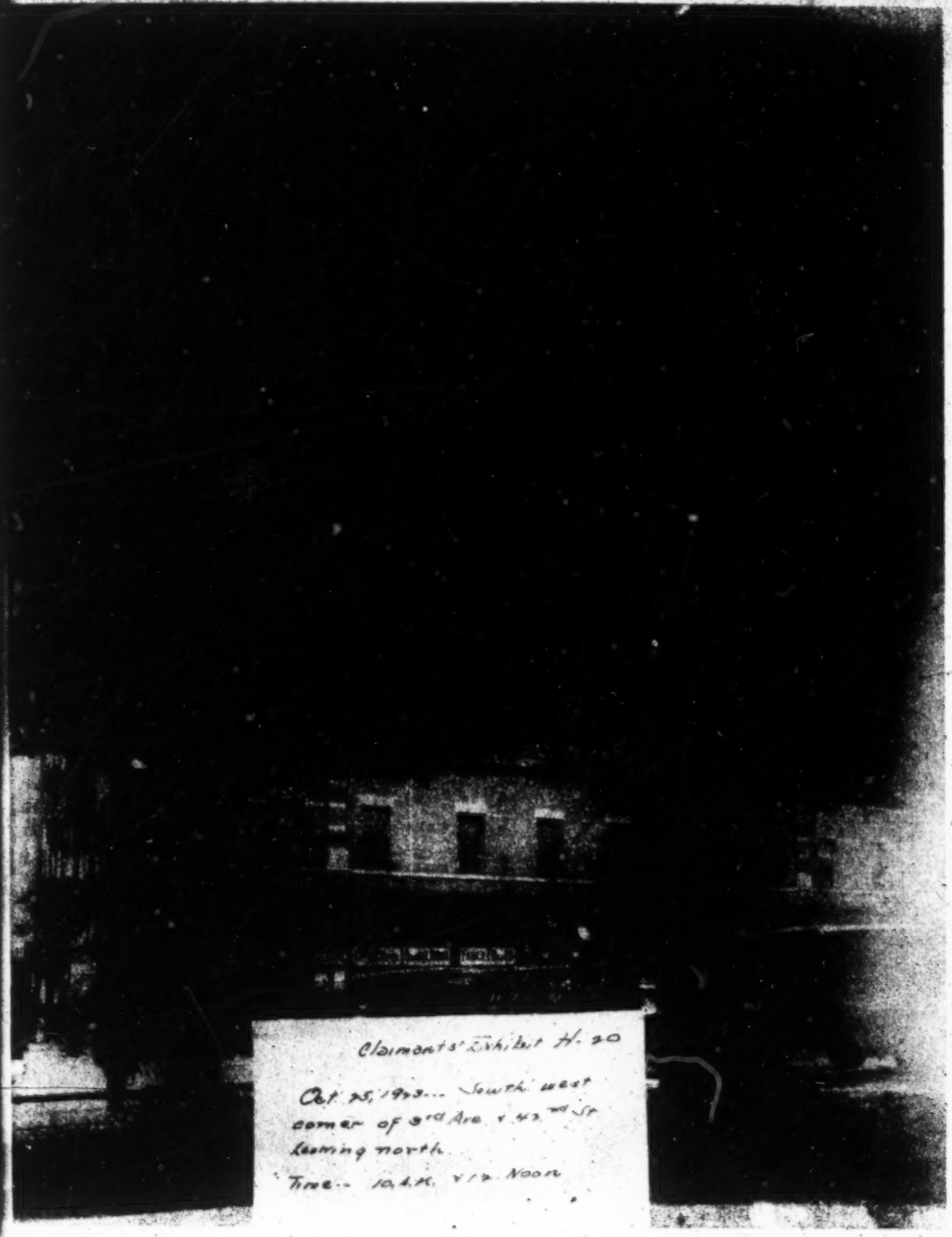
Time --- bet. 10 A.M. & 12 M.


UNITED CIGAR S


Claimants' Exhibit H-17
Oct. 9. 1923 --- Bowery
Savings Bank, #110 E. 42nd St
looking south
Time --- Oct 10 A.M. + 12 M.


Claimants' Exhibit No. 8
Oct 9, 1923 -- 9118-100 East
46th St. looking South
Time --- bet 10 A.M. & 12 Noon.

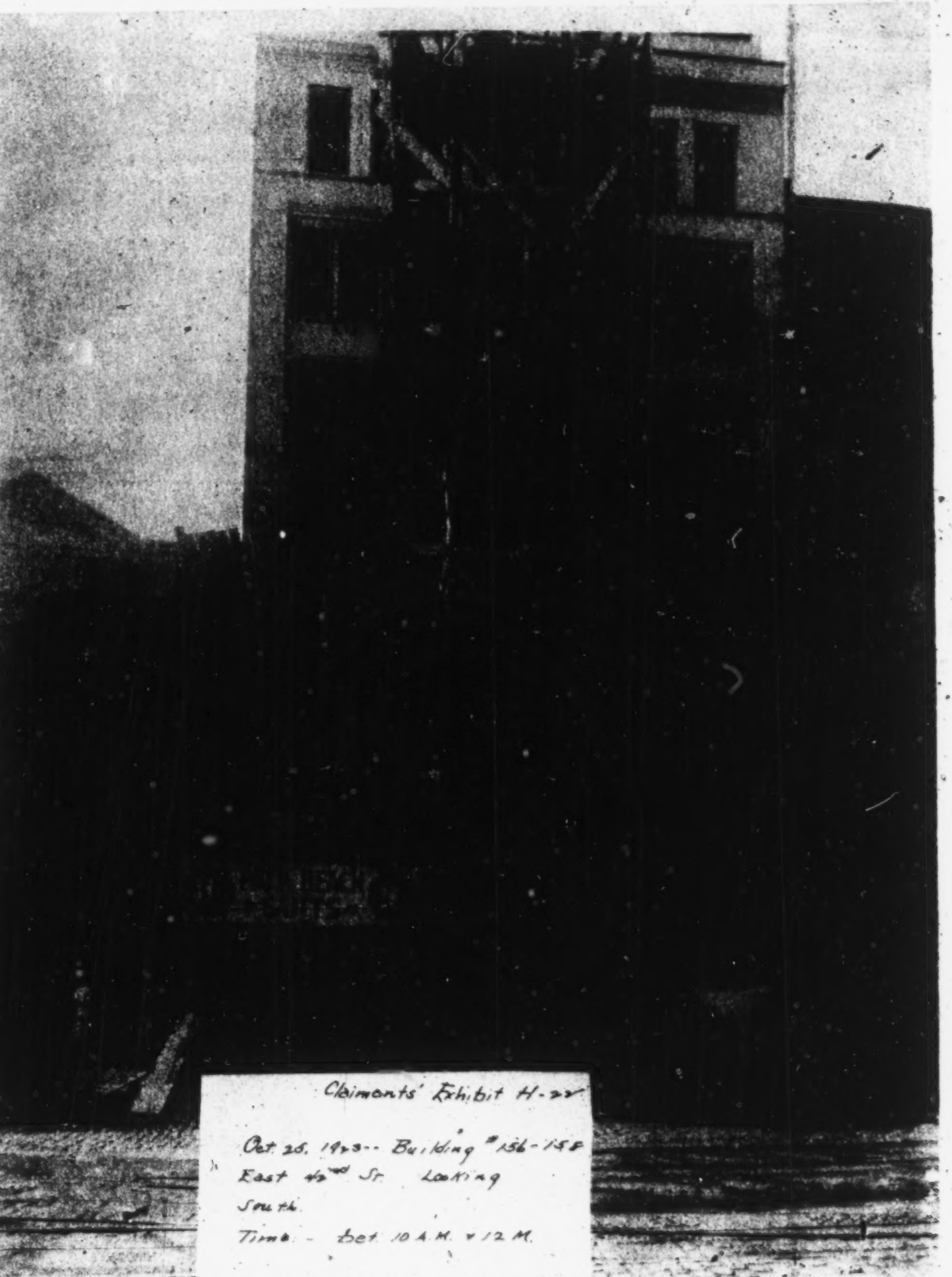




Claimants' Exhibit H. 20

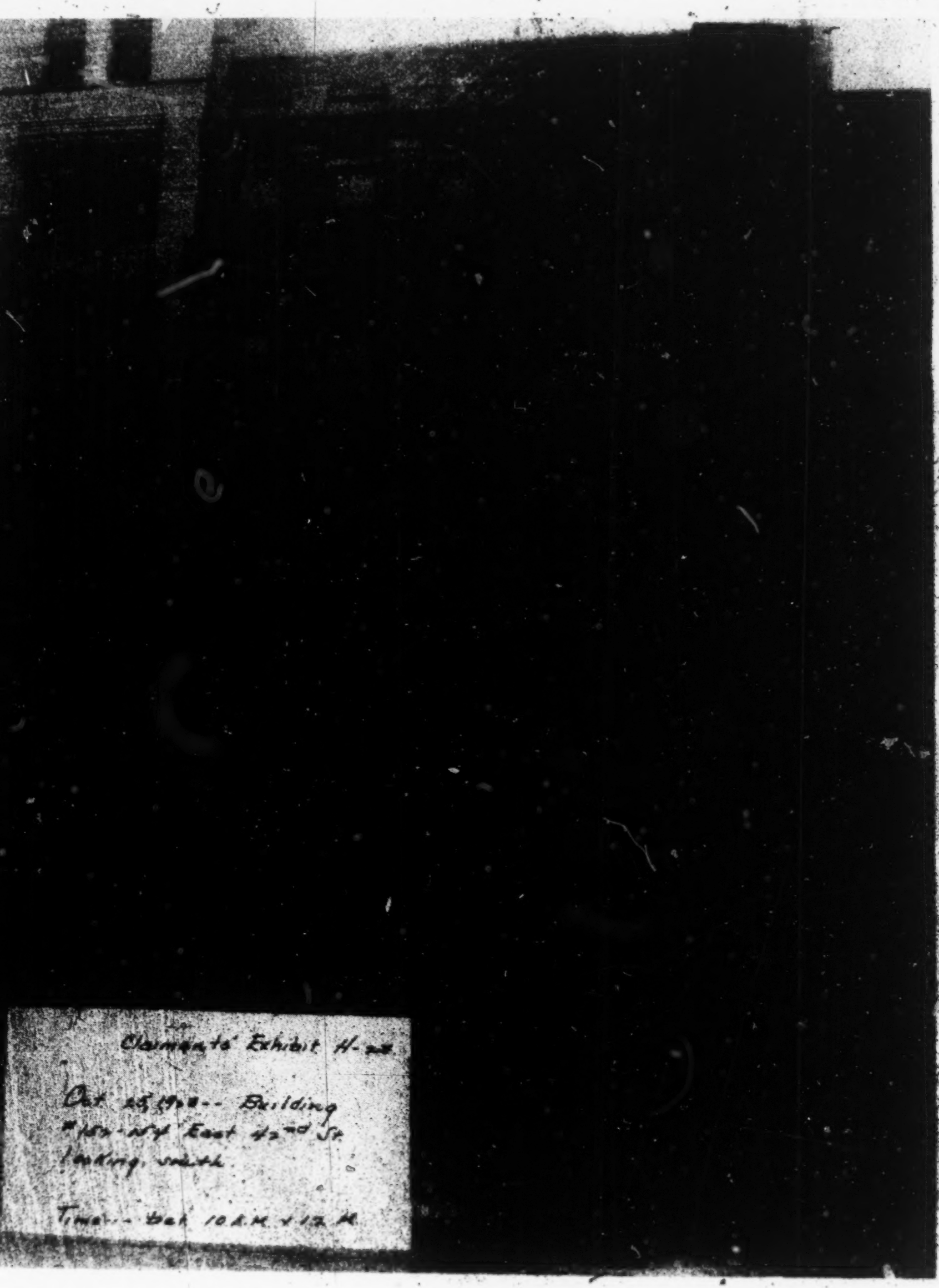
Oct. 25, 1923... South west corner of 3rd Ave. & 43rd St looking north.

Time... 10 A.M. & 12 Noon



Claimants' Exhibit H-22

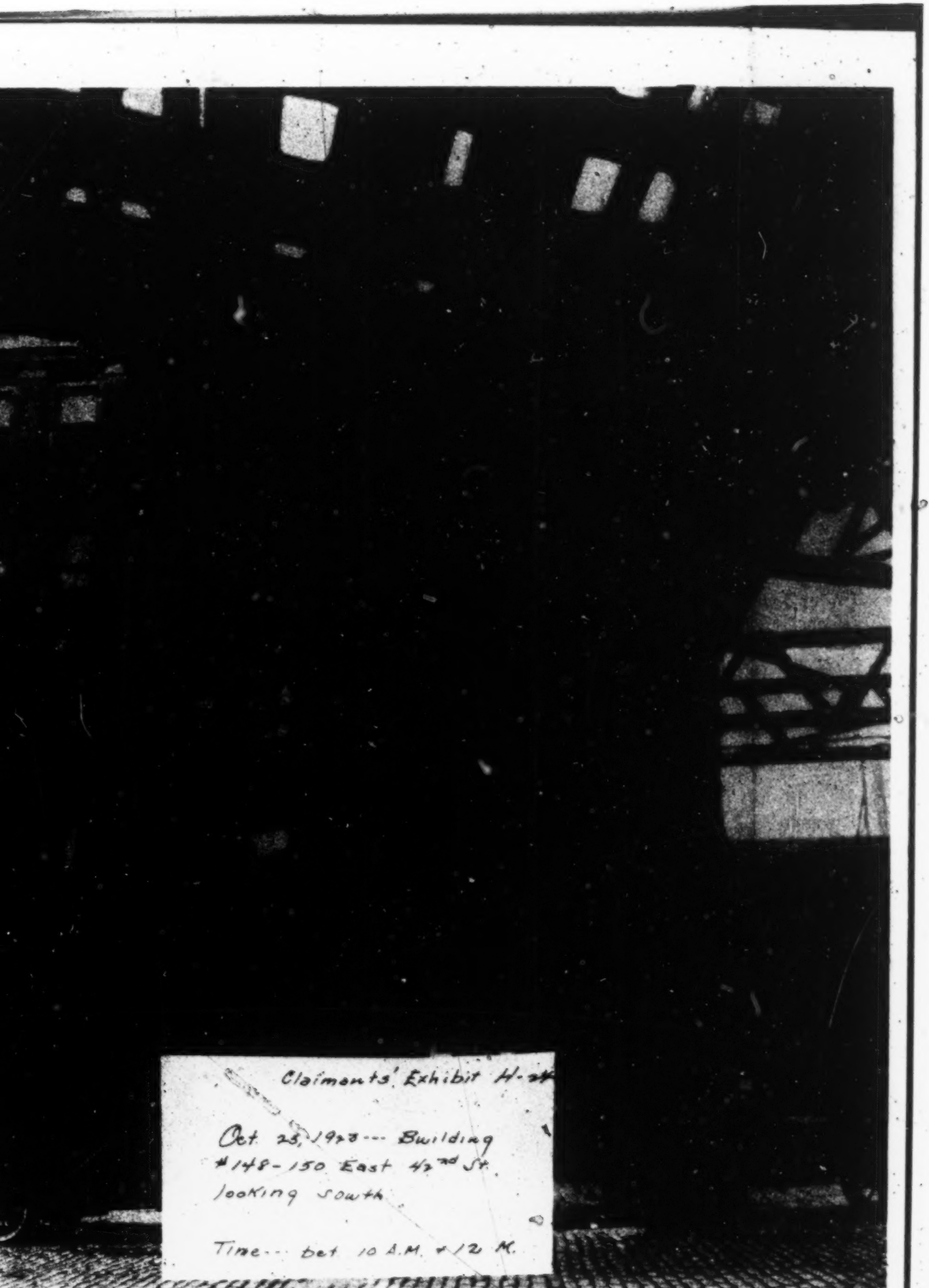
Oct. 26. 1923 -- Building #156-158
East 42nd St. Looking
South.
Time - bet. 10 A.M. & 12 M.



Claimants' Exhibit H-28

Oct 25, 1918 -- Building
#165-167 East 42nd St.
looking south.

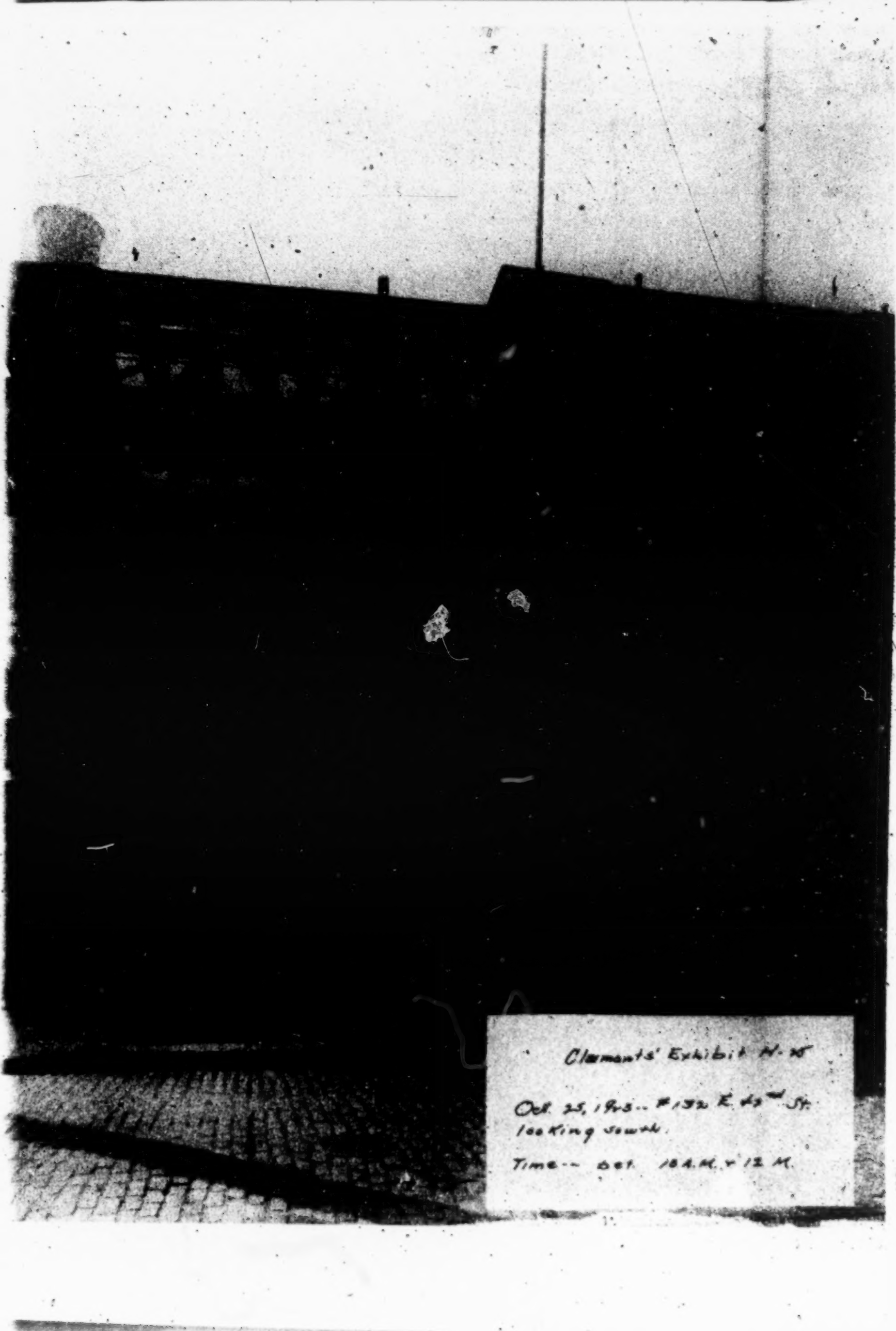
Time -- 10 A.M. & 12 M.



Claimants' Exhibit H-2

Oct. 25, 1923 --- Building
#148-150 East 42nd St.
looking South

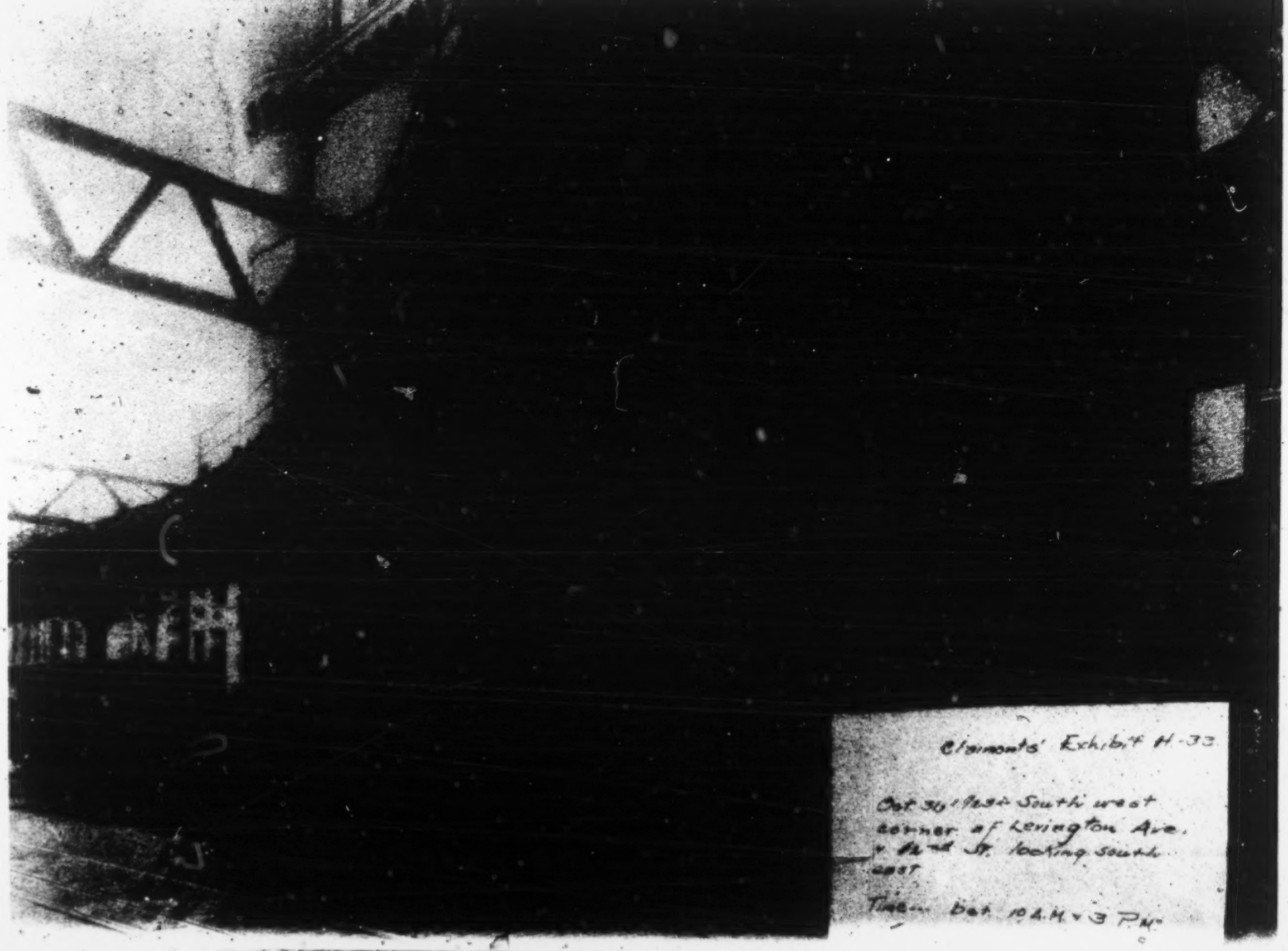
Time --- bet 10 A.M. & 12 M.


Claimants' Exhibit No. 25
Oct. 25, 1943 -- #132 E. 43rd St.
looking south.
Time -- Oct. 10 A.M. & 12 M.

Claimants' Exhibit H-87

- Oct 31, 1923... South-west corner of Lexington Ave. & 42nd St. looking south west.

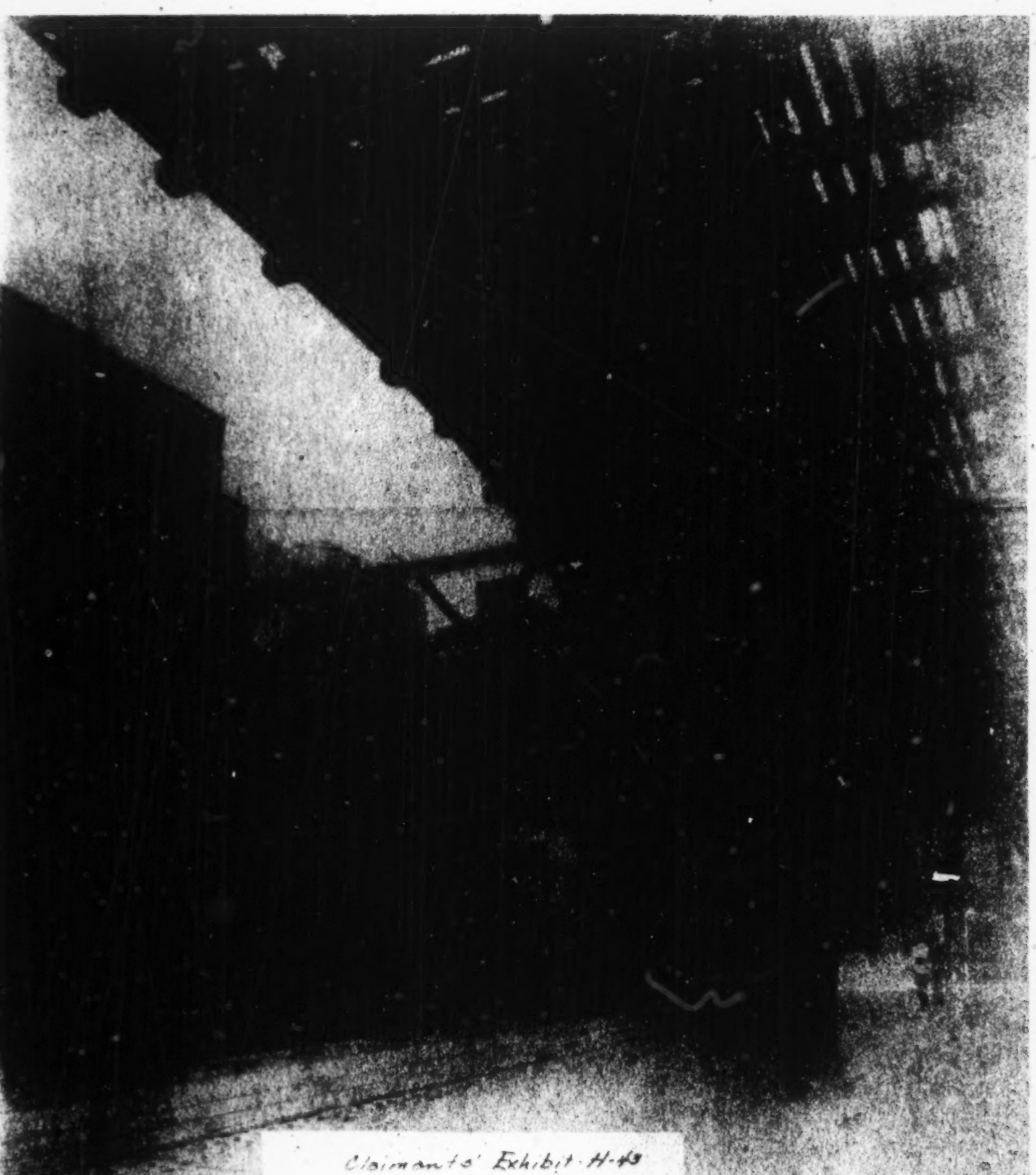
Time... Bet 10 A.M. & 3 P.M.



Claimants' Exhibit H-33

Oct 30/1934 South west corner of Lexington Ave. & 42nd St. looking south east

Time — Bet 10 A.M. & 3 P.M.



Claimant's Exhibit H-43

Oct 31, 1923 --- South side
of 42nd St Tarlton
From front of #157 E. 42nd St.
looking southwest

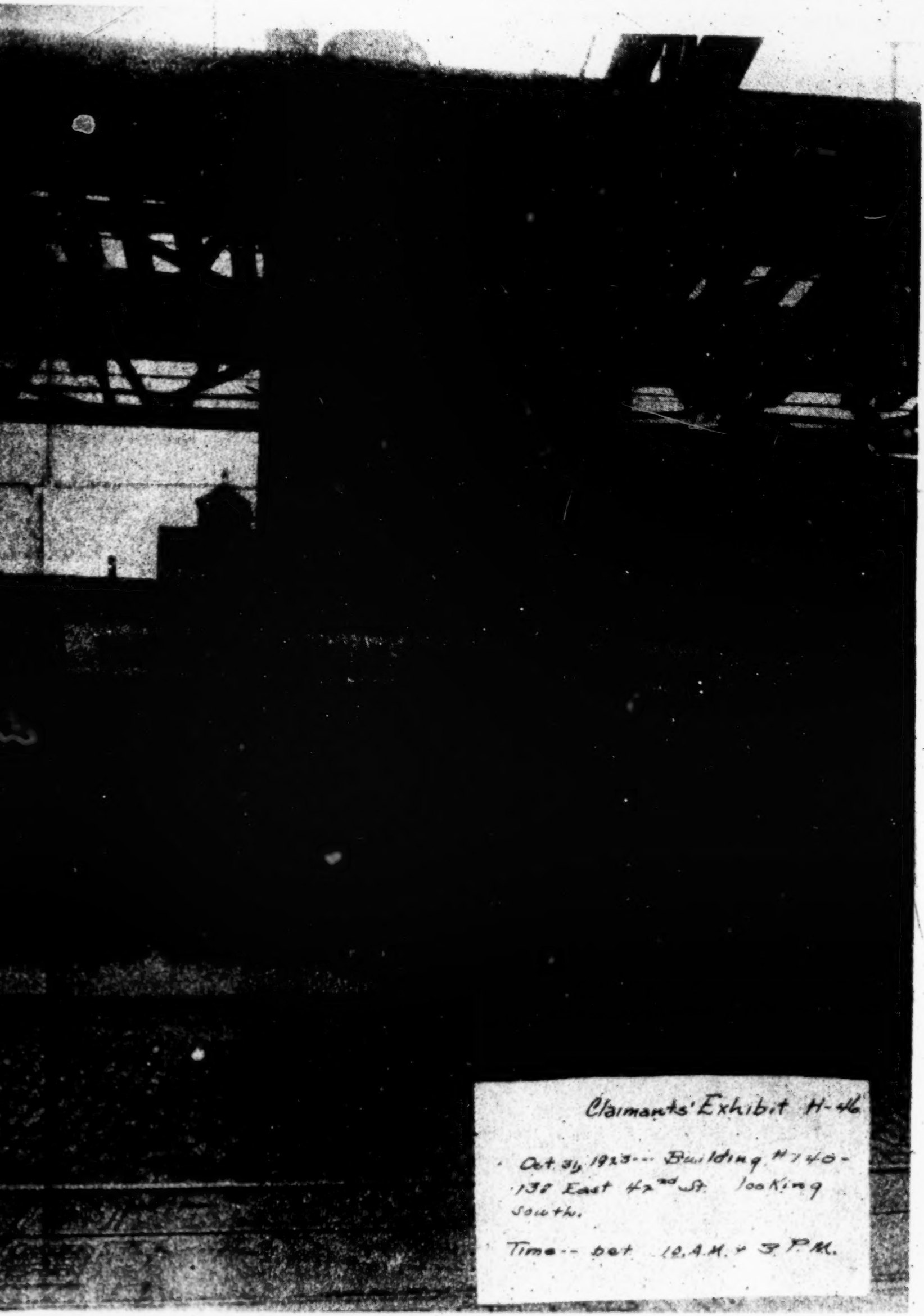
Time --- bet 10 A.M & 3 P.M.



Claimants' Exhibit No. 45

Oct. 31, 1923 -- Building "144" - 144 East 42nd St. looking South.

Time --- Bet. 10 A.M. & 3 P.M.



Claimants' Exhibit H-46

Oct. 31, 1923 --- Building #140-138 East 42nd St. looking South.

Time -- Oct. 10 A.M. & 3 P.M.

5722 **Claimants' Exhibits "H-3," "H-4," "H-5," "H-6," "H-7," "H-12," "H-13," "H-14," "H-15," "H-21," "H-26," "H-27," "H-28," "H-29," "H-30," "H-31," "H-34," "H-35," "H-36," "H-37," "H-38" and "H-42"—Twenty-two (22) Photographs of North Side of 42nd Street Showing Structures and Abutting Properties.**

Claimants' Exhibit "H-3"—Photograph showing building #141 East 42nd Street looking north.

Claimants' Exhibit "H-4"—Photograph showing building #143 East 42nd Street looking north.

Claimants' Exhibit "H-5"—Photograph showing building #145-147 East 42nd Street looking north.

Claimants' Exhibit "H-6"—Photograph showing building #149 East 42nd Street looking north.

5723 Claimants' Exhibit "H-7"—Photograph showing building #153 East 42nd Street looking north.

Claimants' Exhibit "H-12"—Photograph showing northeast corner of Lexington Avenue and 42nd Street looking north.

Claimants' Exhibit "H-13"—Photograph showing west end of 42nd Street side Hotel Commodore looking north.

Claimants' Exhibit "H-14"—Photograph showing 42nd Street entrance to Hotel Commodore looking north.

Claimants' Exhibit "H-15"—Photograph showing north side of 42nd Street looking east along 42nd Street from Park Avenue.

Claimants' Exhibit "H-21"—Photograph showing northwest corner of 3rd Avenue and 42nd Street looking north.

5724 Claimants' Exhibit "H-26"—Photograph showing #161-163 East 42nd Street looking north.

Claimants' Exhibit "H-27"—Photograph showing #159 East 42nd Street looking north.

Claimants' Exhibit "H-28"—Photograph showing #157-155 East 42nd Street looking north.

Claimants' Exhibit "H-29"—Photograph showing station at 3rd Avenue looking east along 42nd Street.

Claimants' Exhibit "H-30"—Photograph showing #139 East 42nd Street looking north.

Claimants' Exhibit "H-31"—Photograph showing northwest corner of Lexington Avenue and 42nd Street looking northwest.

Claimants' Exhibit "H-34"—Photograph showing easterly entrance to Grand Central Terminal on 42nd Street looking northeast.

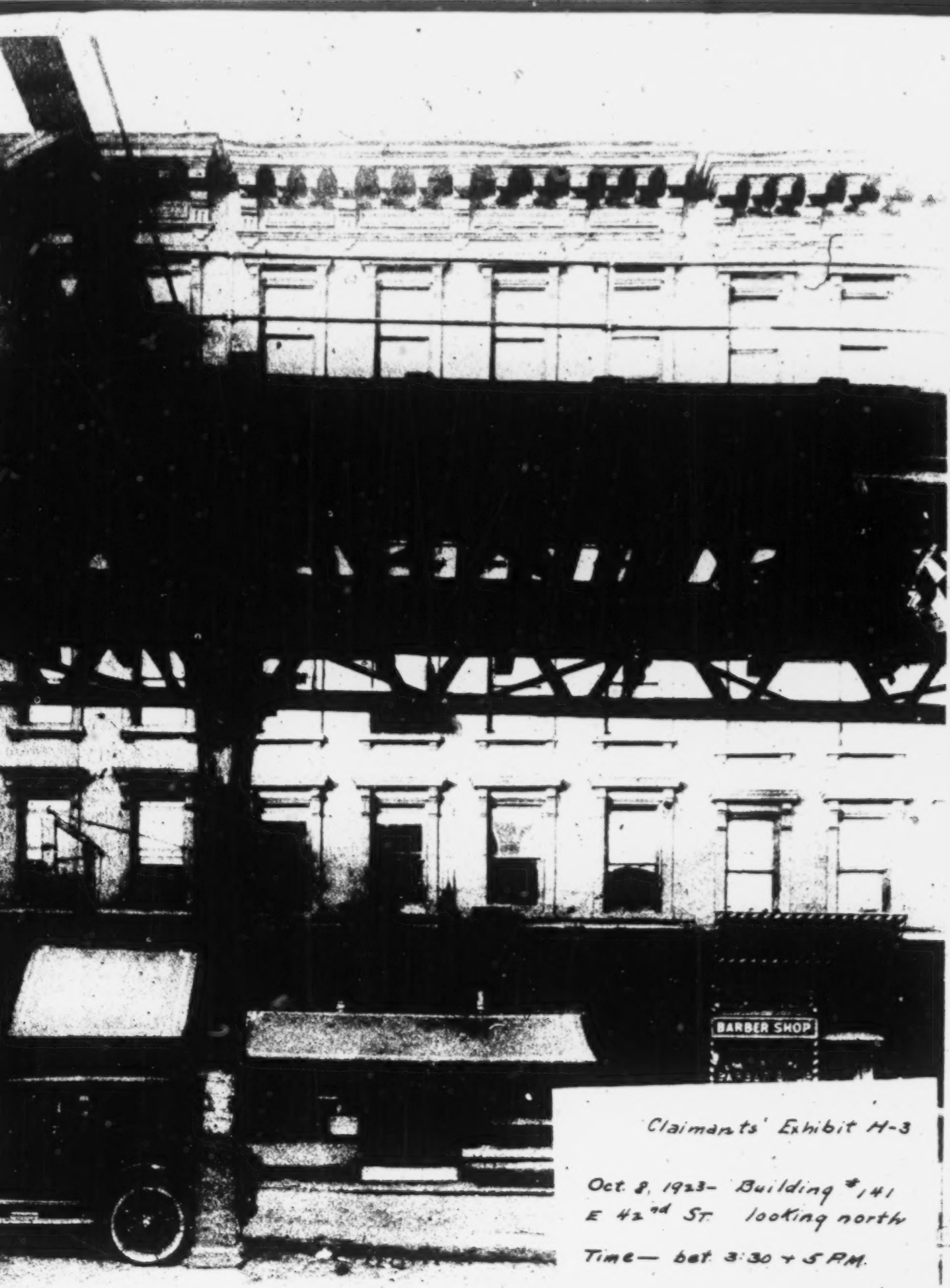
Claimants' Exhibit "H-35"—Photograph showing easterly entrance to Grand Central Terminal on 42nd Street looking northwest.

Claimants' Exhibit "H-36"—Photograph showing intersection at Park Avenue and 42nd Street looking west.

Claimants' Exhibit "H-37"—Photograph showing westerly end of elevated structure at Park Avenue and 42nd Street looking east.

Claimants' Exhibit "H-38"—Photograph showing stairway on north side of 42nd Street and Park Avenue leading to elevated structure looking north.

Claimants' Exhibit "H-42"—Photograph showing north side of 42nd Street taken from front of building #158 East 42nd Street looking



Claimants' Exhibit H-3

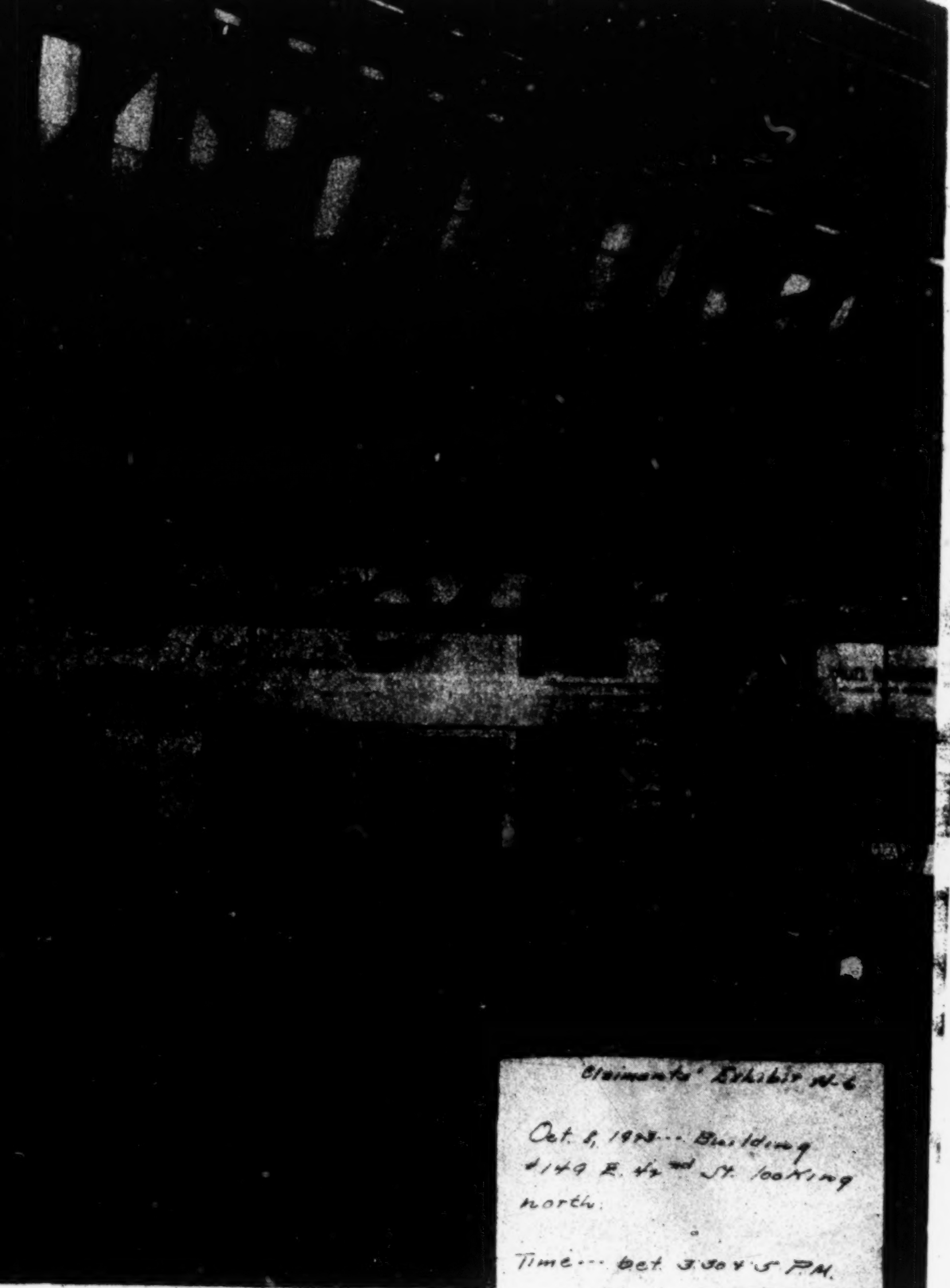
Oct. 8, 1923- Building #141
E 42nd St looking north

Time— bet 3:30 + 5 P.M.

Elevimendo Exhibition 11-6

Date 6/10/... Bus. Mtng
6/11 Exhibition
Location
Time ... 8:30 a.m. P.M.



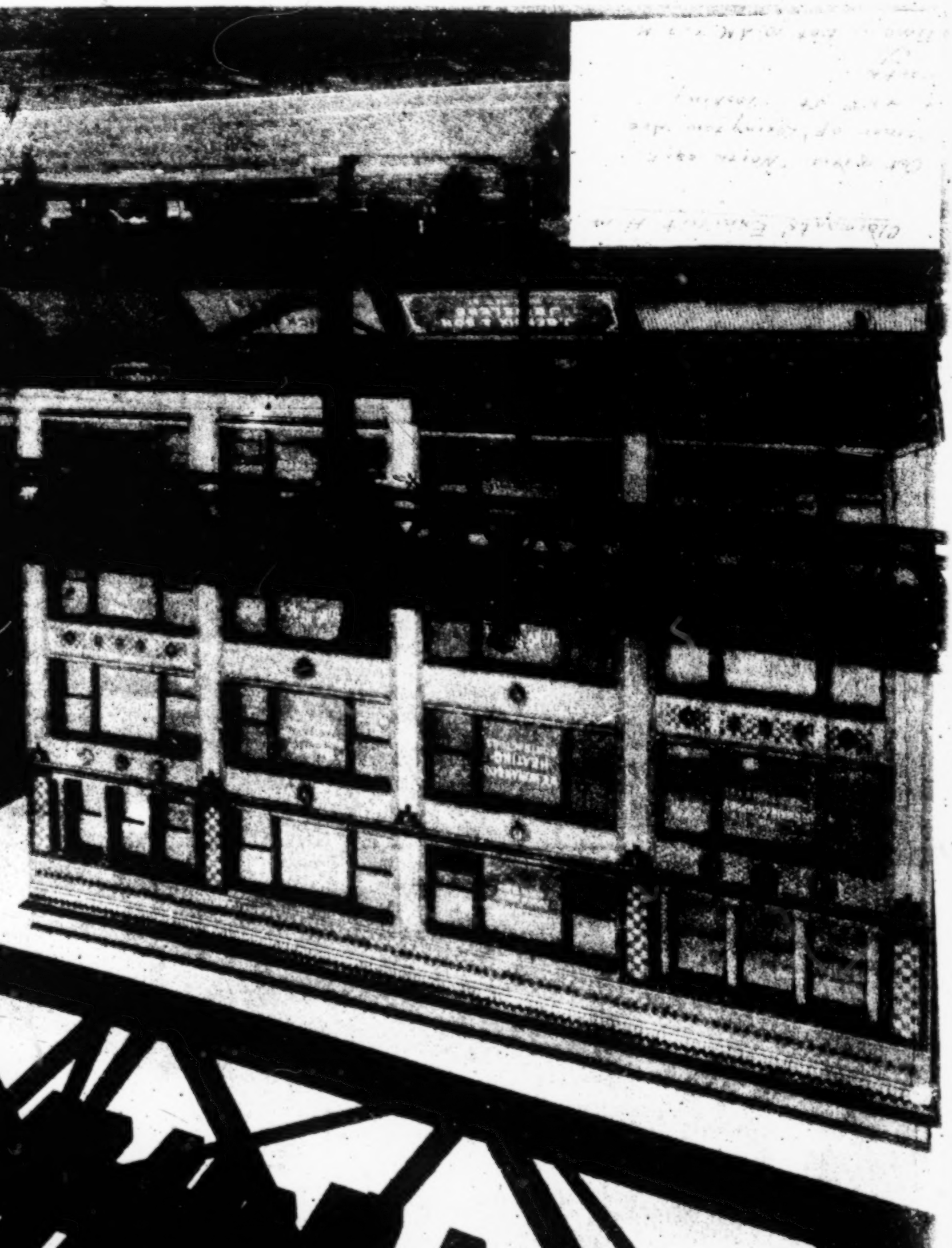


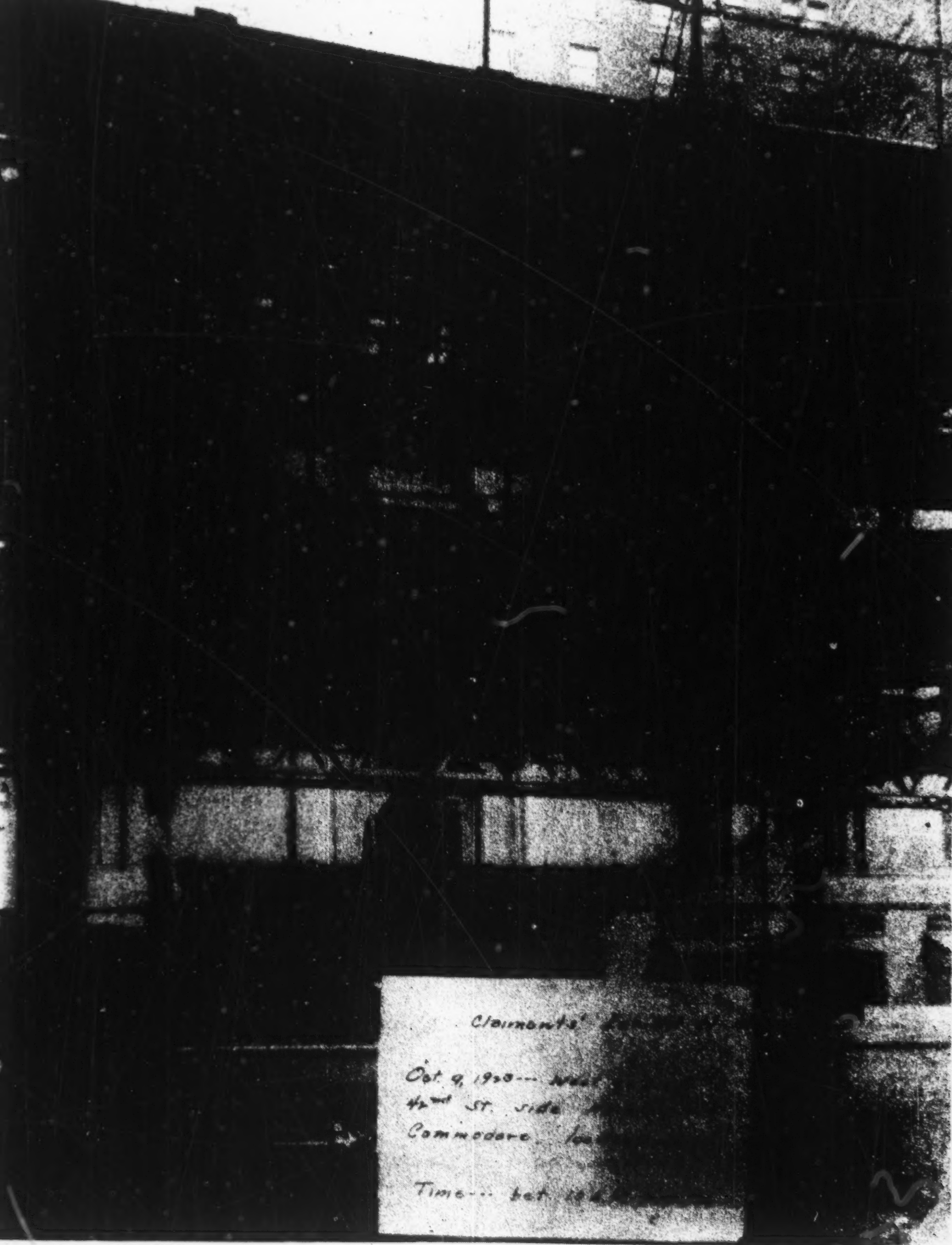
Claimants' Exhibit No. 6

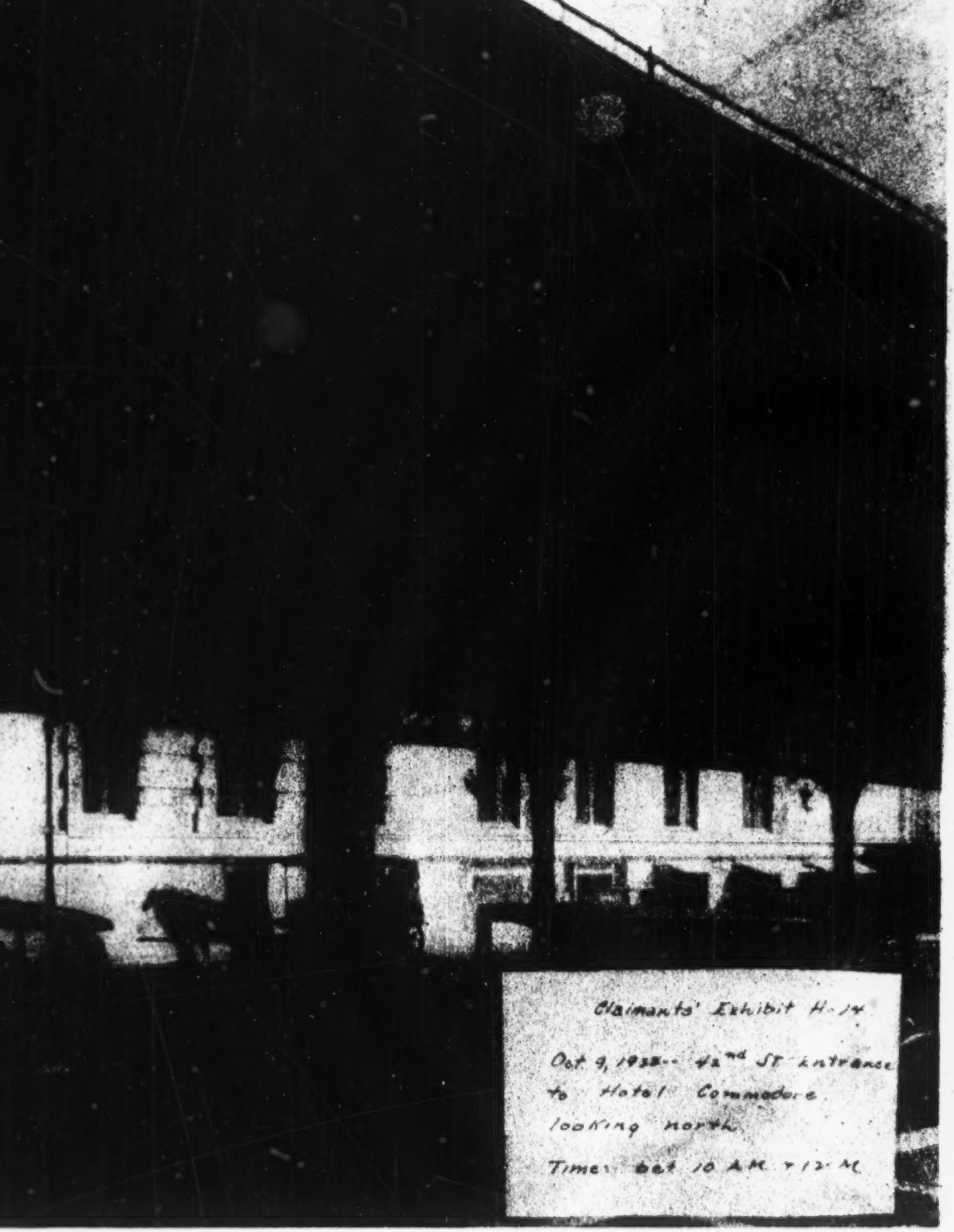
Oct. 8, 1928 --- Building
#149 E. 42nd St. looking
north.

Time --- Oct. 3:30 P.M.

7




Claimants'
Oct. 9, 1920 ---
42nd ST. side
Commodore
Time --- bet.



Claimants' Exhibit H-14

Oct. 9, 1938 -- 42nd St. Entrance to Hotel Commodore looking north

Time: bet 10 A.M. & 12 M.

Claimants' Exhibit H-15

Oct 9, 1929-- North side of 42nd St looking east along 42nd St from Park Ave.

Time-- bet 10 A.M. & 12 Noon



Claimants' Exhibit H-26

Oct 25, 1923 --- #161-163 East
42nd St. Looking north.

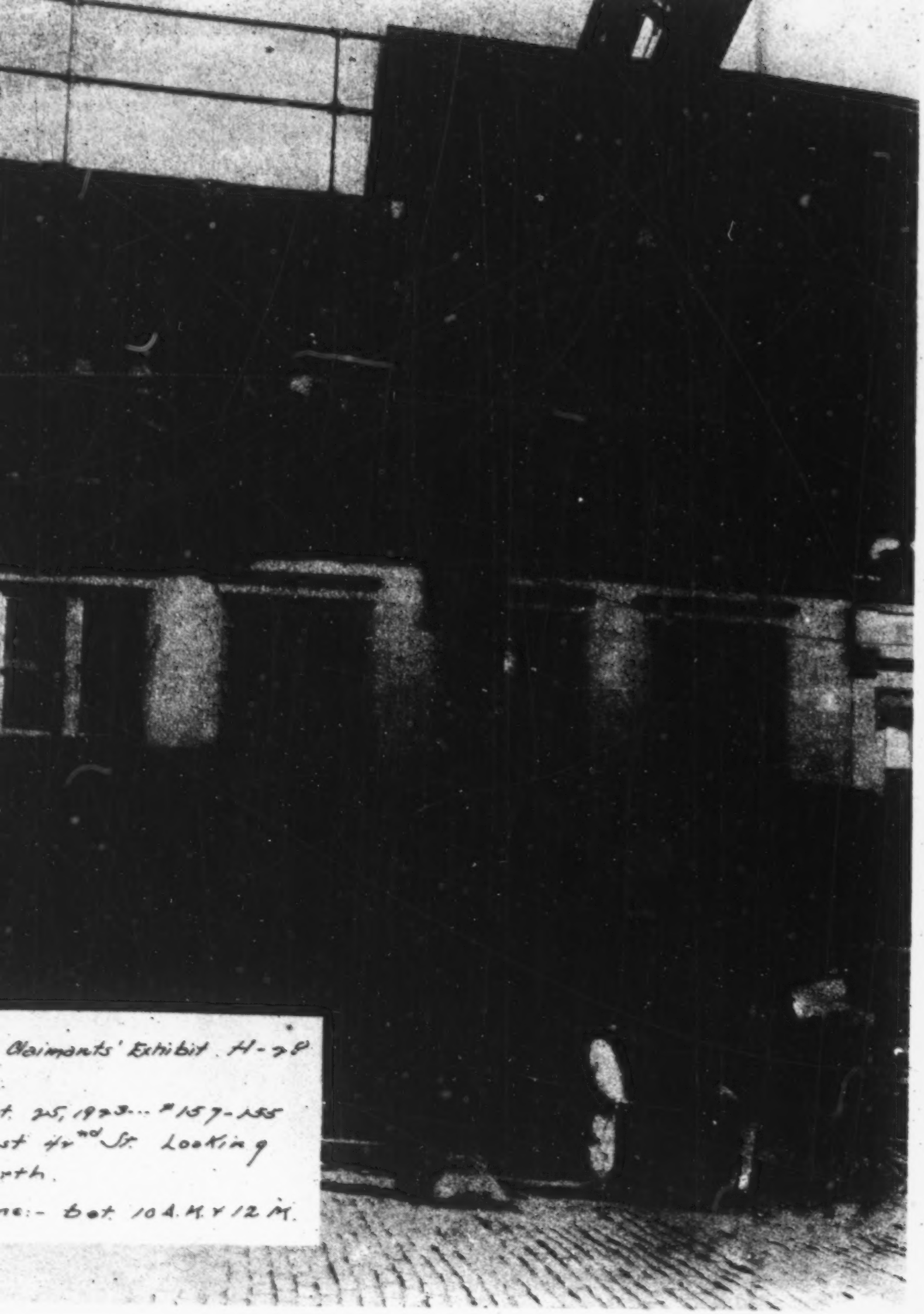
Time:- bet 10 A.M. & 12 M.



Claimants' Exhibit #7

Oct. 25, 1938 -- #159 East [illegible] St.
looking north.

Time:- bet. 10 A.M. & 12 M.



Claimants' Exhibit H-28

t. 25, 1923... #157-155
st 4th and St. Looking
rth.
ne:- Bet. 10 A.M. & 12 M.

Elsimans Exhibit No. 38

Oct 26, 1923. Looking east
Elsman's Tie Shaping
Station at Grid Ave.

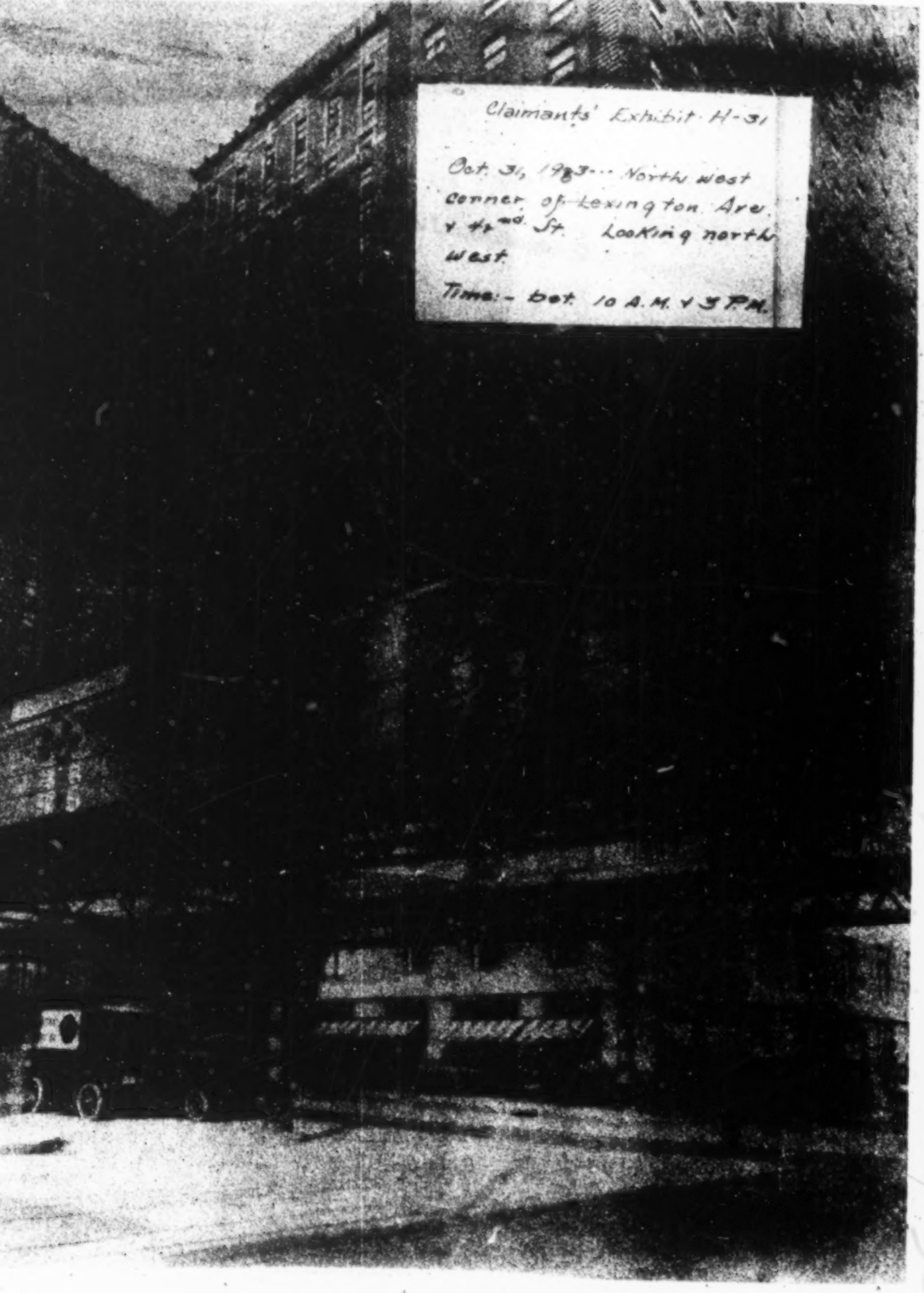
Time - Dec 10 A.M. 1923



Claimants' Exhibit H-30

Oct. 31, 1923 ... #139 E. 40th St.
Looking north.

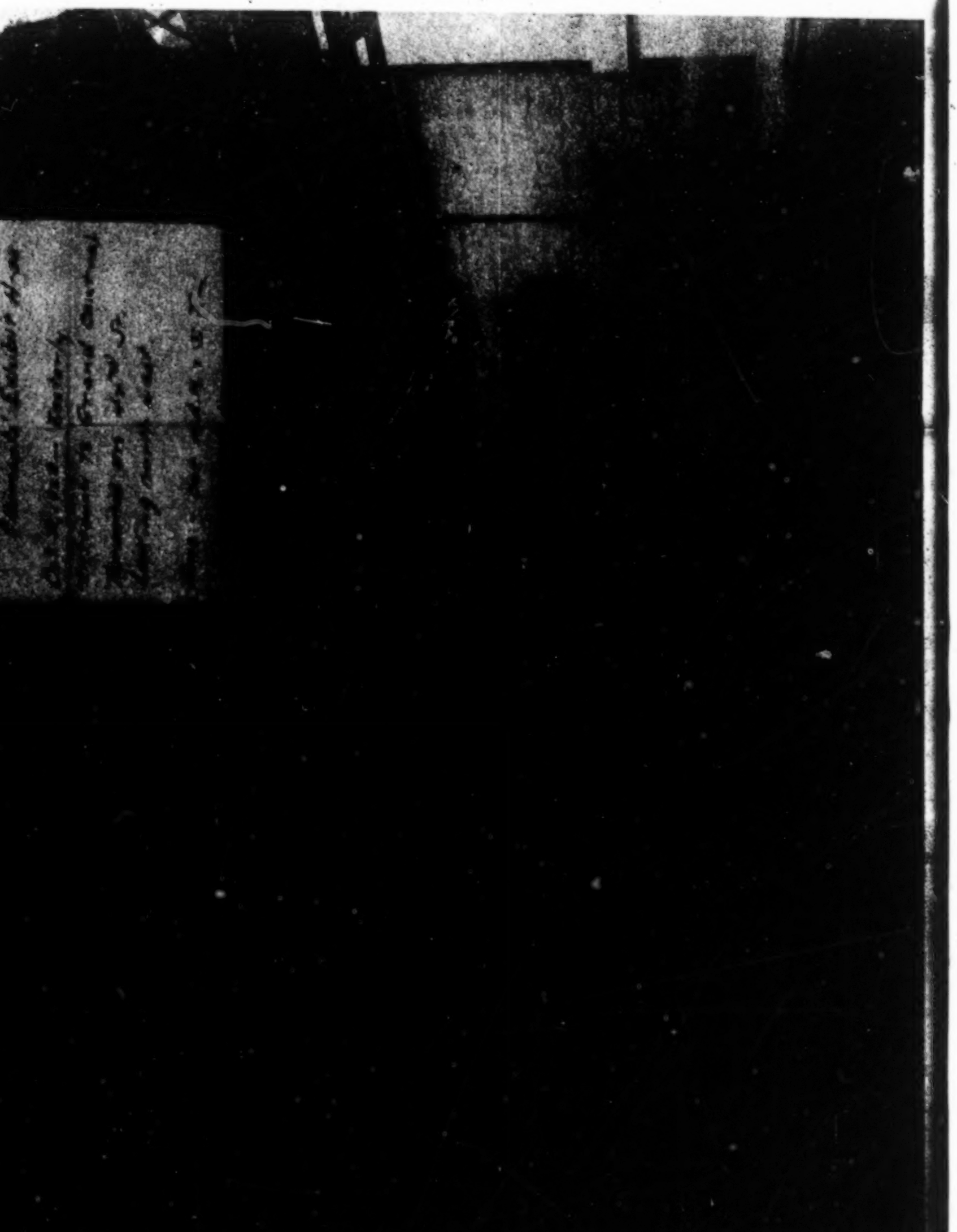
Time: - bet. 10 A.M. + 3 P.M.


Claimants' Exhibit H-31
Oct. 31, 1923 --- North West
Corner of Lexington Ave.
& 42nd St. Looking north
West
Time:- bet. 10 A.M. & 3 P.M.

Claimants' Exhibit H-84

Oct. 21, 1943 -- Easterly entrance to Grand Central Terminal on 42nd St. Looking north east.

Time - bet. 10 A.M. & 3 P.M.



Clairmont Exhibit #26

Oct 31, 1923 — Intersection
at Park Ave & 3rd St
looking west

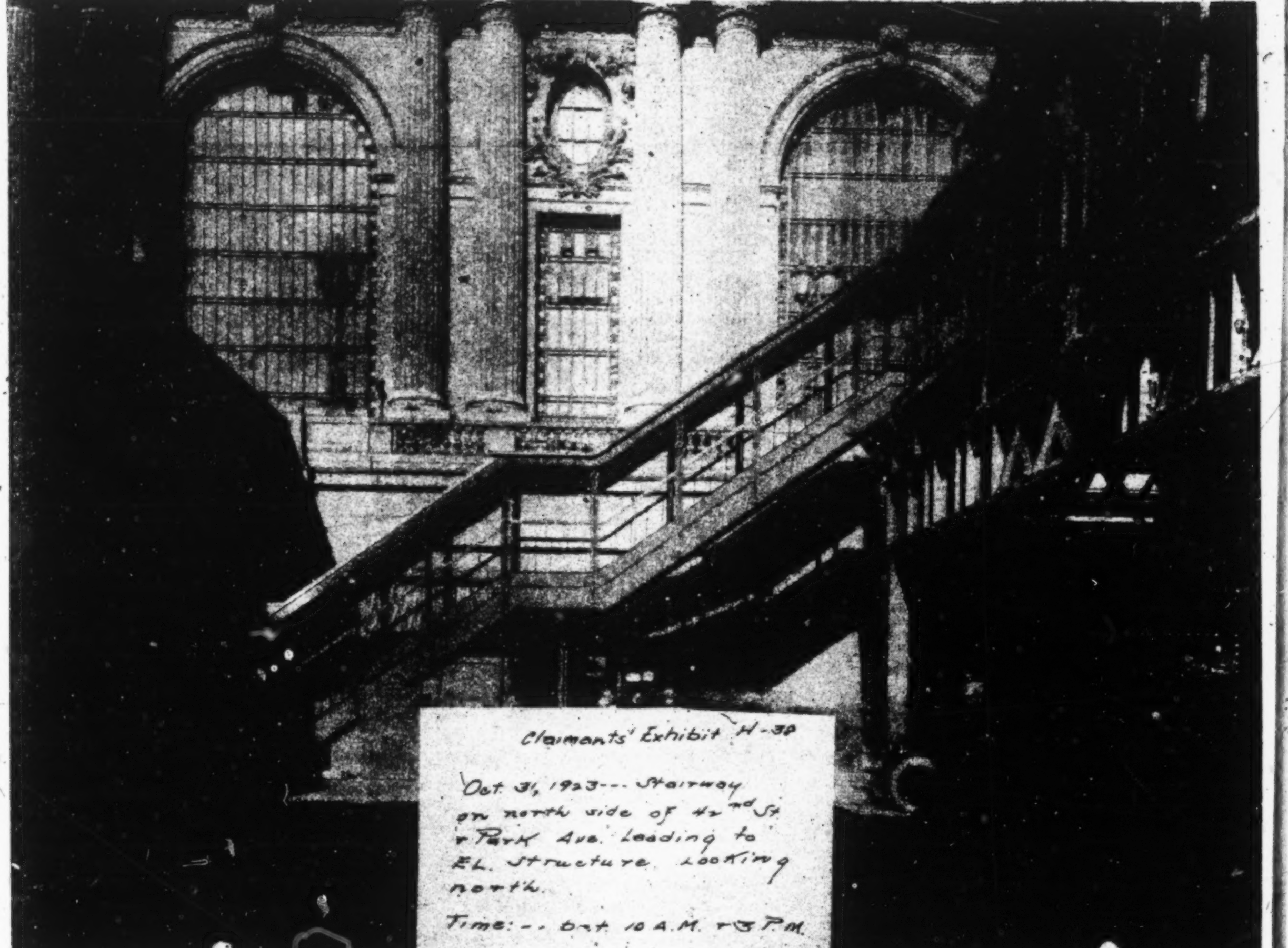
Time... Oct 31 — 3 PM



Claimants' Exhibit H-37

Oct. 31, 1923 --- Westerly end of Elevated Structure at Park Ave. & 42nd St. looking east.

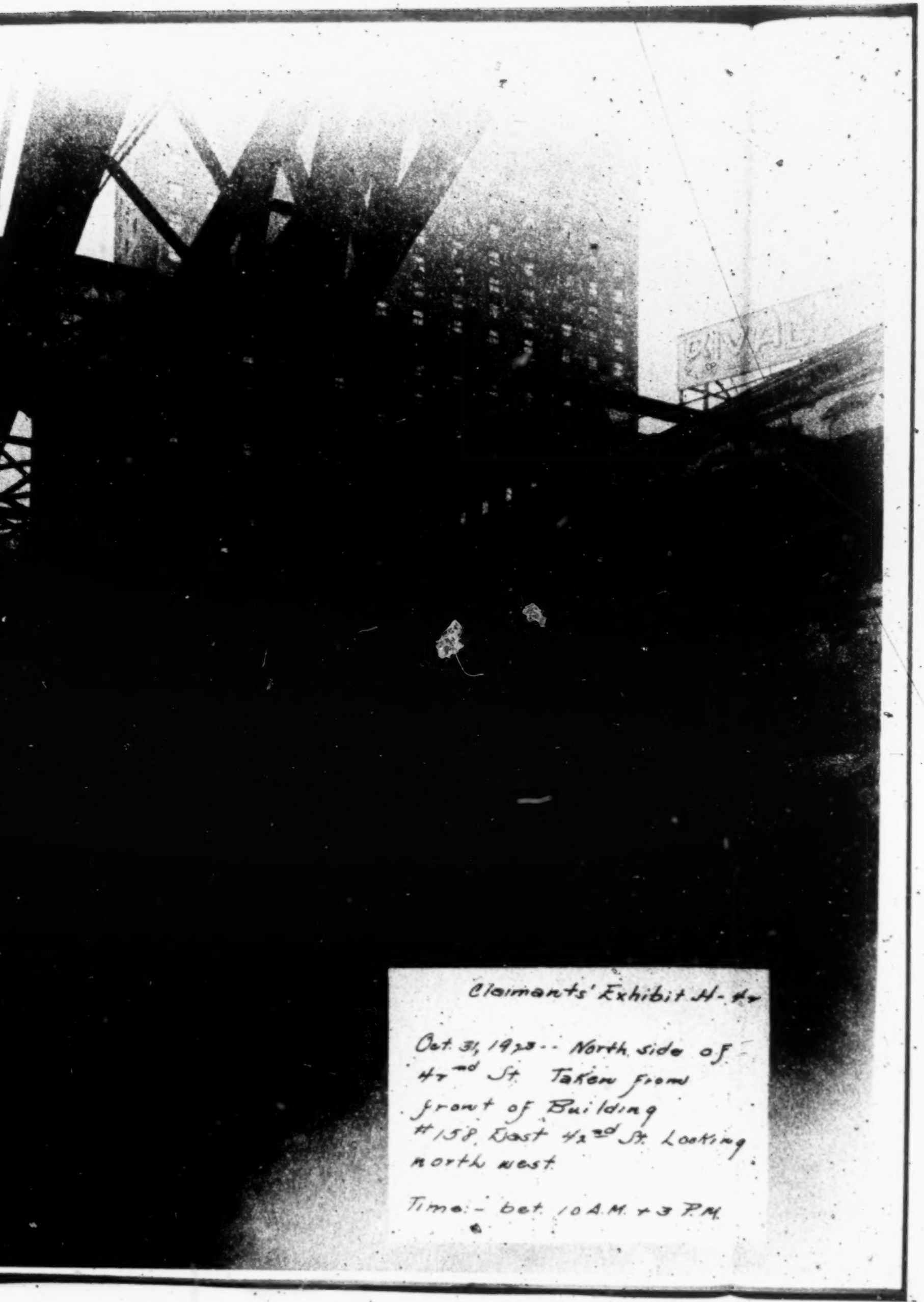
Time:- bet. 10 A.M. & 3 P.M.



Claimants' Exhibit H-38

Oct. 31, 1923--- Stairway on north side of 42nd St. & Park Ave. leading to EL. Structure looking north.

Time:-- Bet 10 A.M. & 3 P.M.



Claimants' Exhibit H-47

Oct. 31, 1923 -- North side of 47th St Taken from front of Building #158 East 42nd St. Looking north west

Time:- bet. 10 A.M. & 3 P.M.

1910

5728

5729

Claimants' Exhibit "K-1"—Chart Showing Total Revenue Passengers Carried by Rapid Transit Railways, New York City, for Fiscal Years (1880, 1890 and 1900 to 1923 Both Inclusive), Ended June 30.

5730

RAPID TRANSIT RAILWAYS — NEW YORK CITY

TOTAL REVENUE PASSENGERS CARRIED

FISCAL YEARS ENDED JUNE 30

LEGEND

HUDSON & MANHATTAN ..... Shown Thus ——·——·——

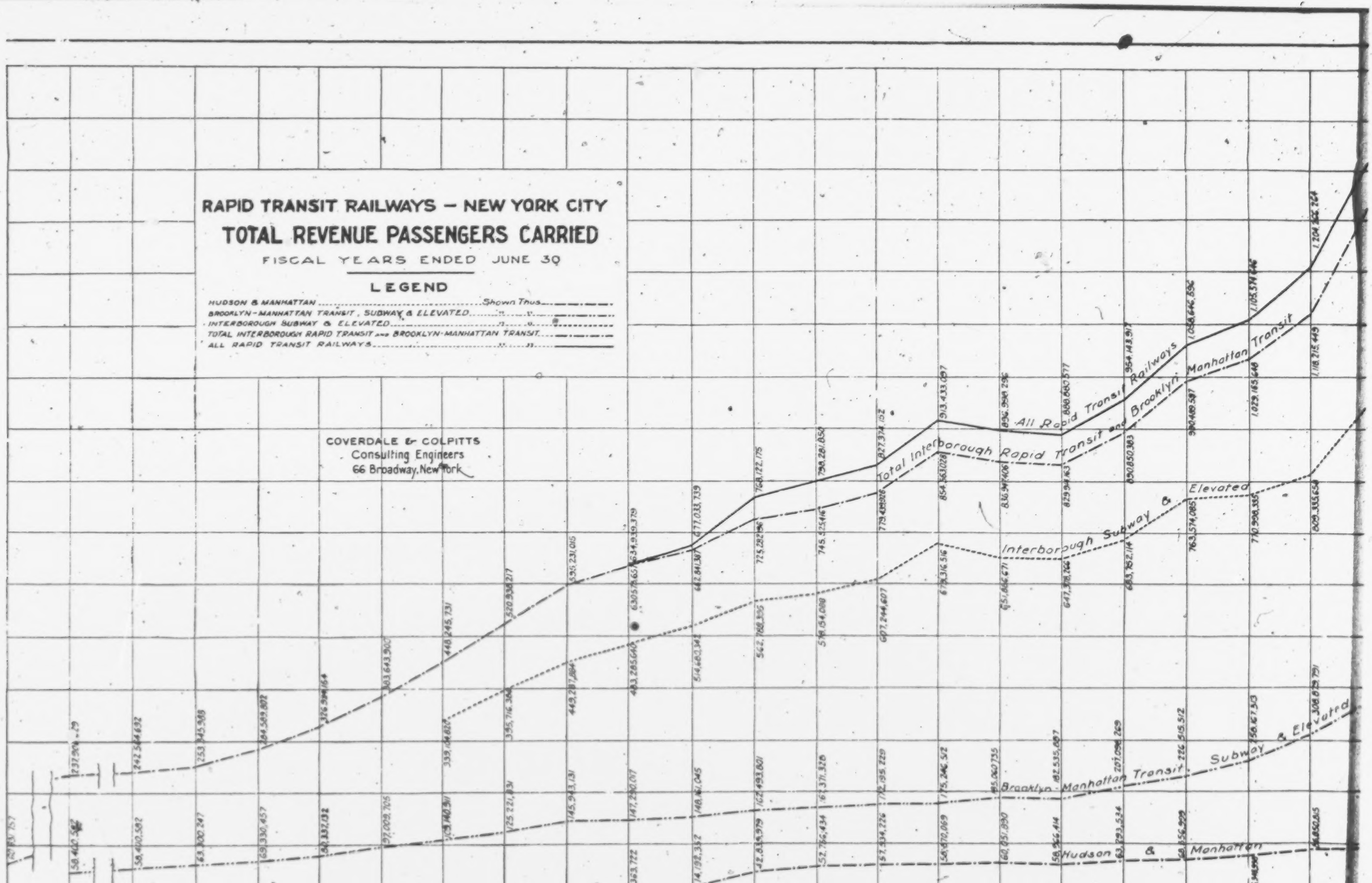
BROOKLYN-MANHATTAN TRANSIT, SUBWAY & ELEVATED ..... " " ——·——·——

INTERBOROUGH SUBWAY & ELEVATED ..... " " ——·——·——

TOTAL INTERBOROUGH RAPID TRANSIT and BROOKLYN-MANHATTAN TRANSIT ..... ——·——·——

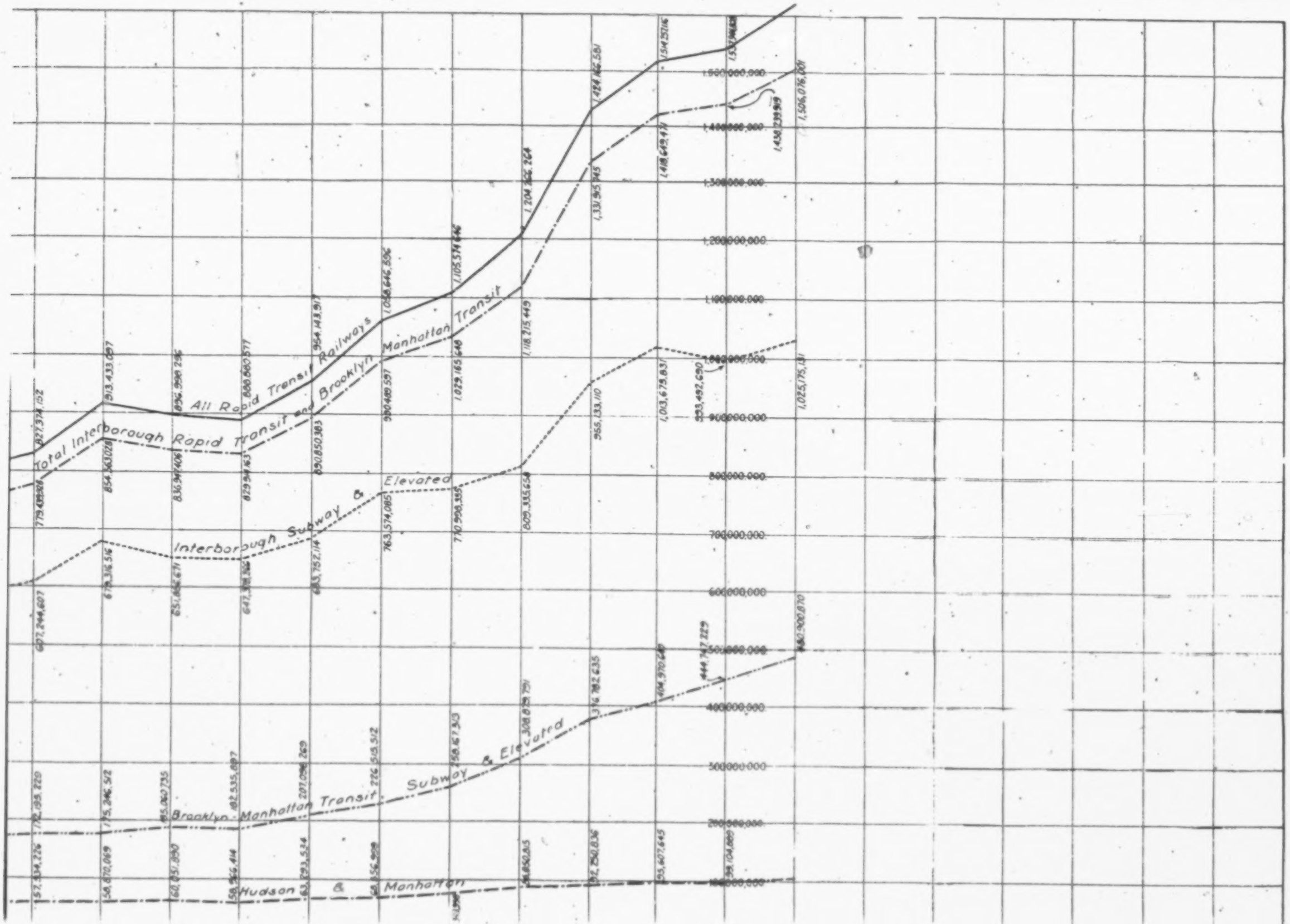
ALL RAPID TRANSIT RAILWAYS ..... " " ——

COVERDALE & COLPITTS
Consulting Engineers
66 Broadway, New York



Claimant's Exh 'K-1'

EXHIBIT A



5734

5735

Claimants' Exhibit "K-2"—Chart Showing Total Revenue Passengers Carried by Interborough Rapid Transit for Fiscal Years (1880, 1890, and 1900 to 1923 Both Inclusive), Ended June 30.

5736

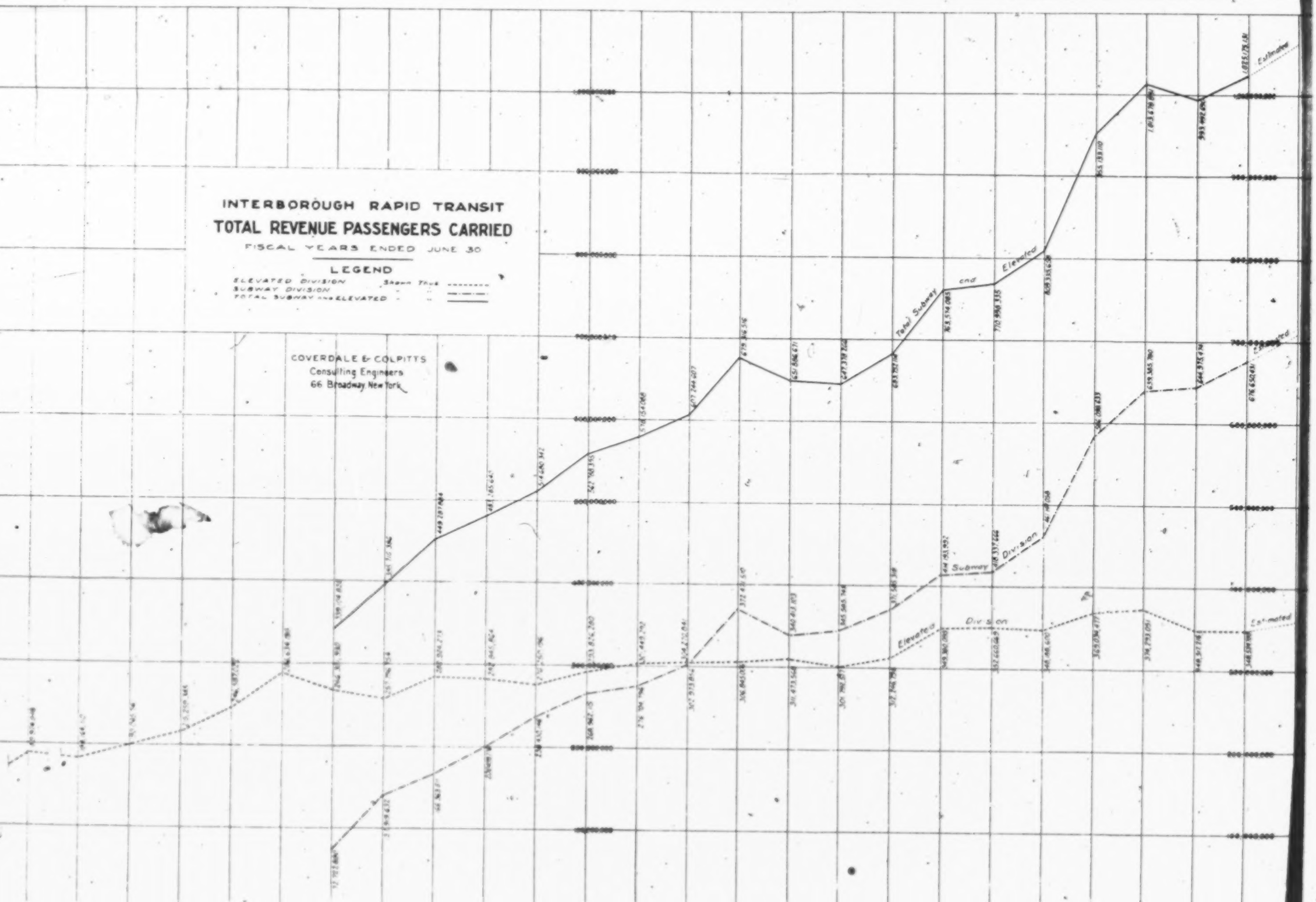
INTERBOROUGH RAPID TRANSIT
TOTAL REVENUE PASSENGERS CARRIED

FISCAL YEARS ENDED JUNE 30

LEGEND

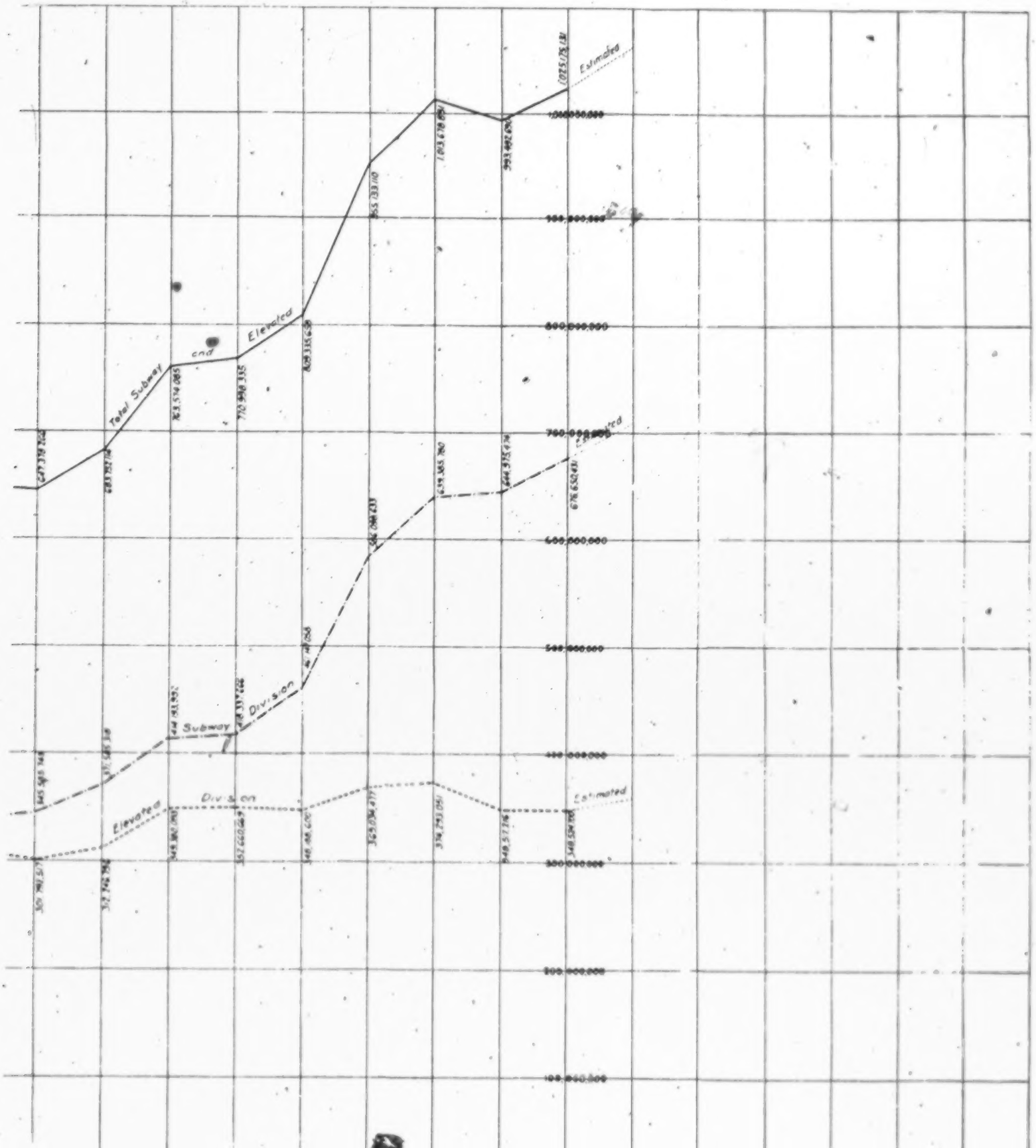
ELEVATED DIVISION — Broken Thick ·····
SUBWAY DIVISION — ·-·-·-
TOTAL SUBWAY and ELEVATED — ——

COVERDALE & COLPITTS
Consulting Engineers
66 Broadway New York



Claimant's Exh'k-2'

EXHIBIT B



5740

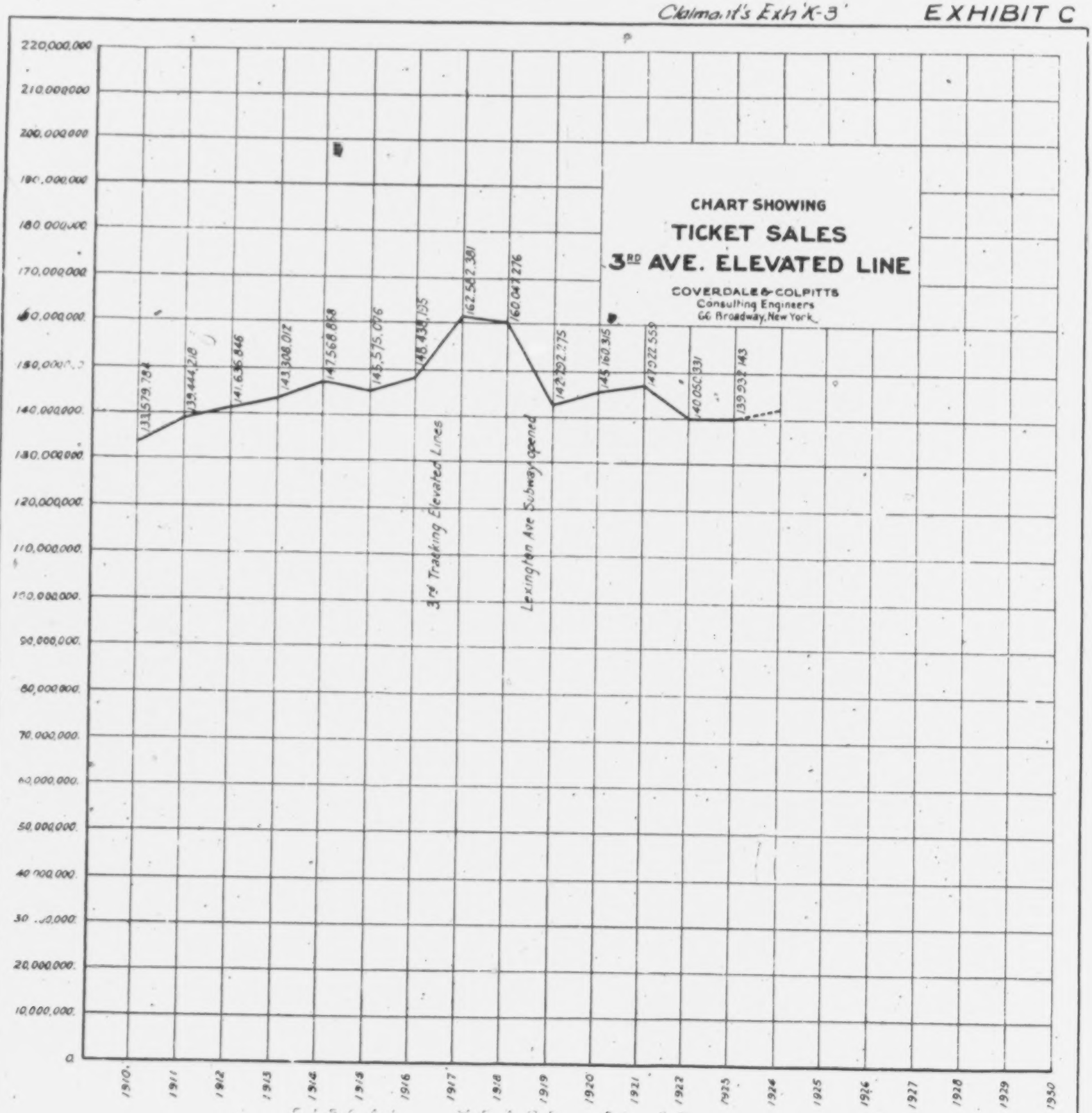
5741

Claimants' Exhibit "K-3"—Chart Showing Ticket Sales on 3rd Avenue Elevated Line for Fiscal Years (1910 to 1923 Both Inclusive), Ended June 30.

5742

Claimant's Exh 'K-3'

EXHIBIT C



5746

5747

Claimants' Exhibit "K-4"—Chart Showing Tickets Sold at Rapid Transit Stations, 42nd Street, New York City, for Fiscal Years (1900, 1902, 1904, 1906, 1908, 1910, 1912, 1914, 1916, 1918, 1920, 1922) Ended June 30.

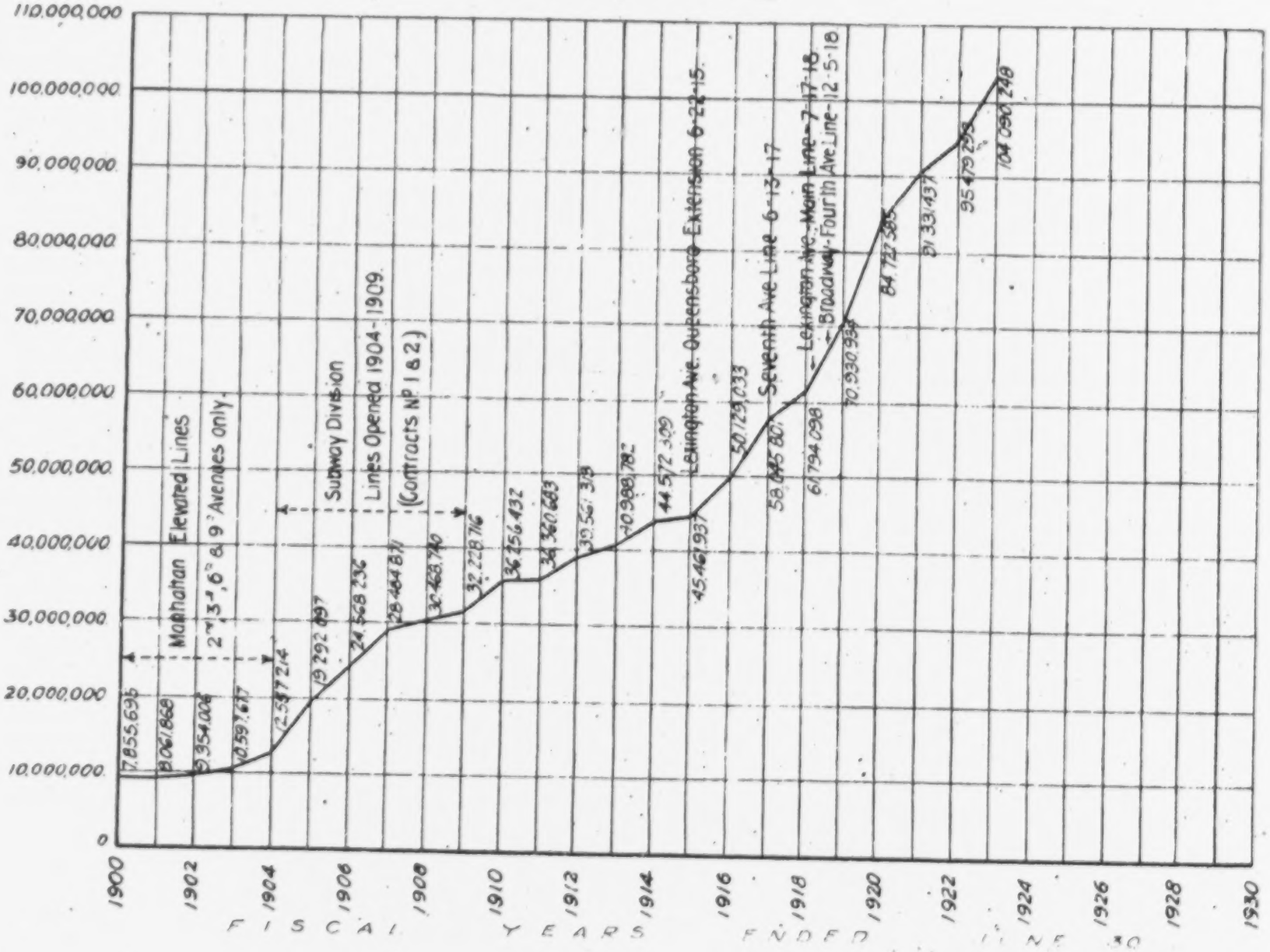
5748

EXHIBIT D

Claimant's Exh. 'K-4'

CHART SHOWING
TICKETS SOLD AT
RAPID TRANSIT STATIONS
42ND STREET, N.Y. CITY.

COVERDALE & COLPITTS
Consulting Engineers
66 Broadway, New York

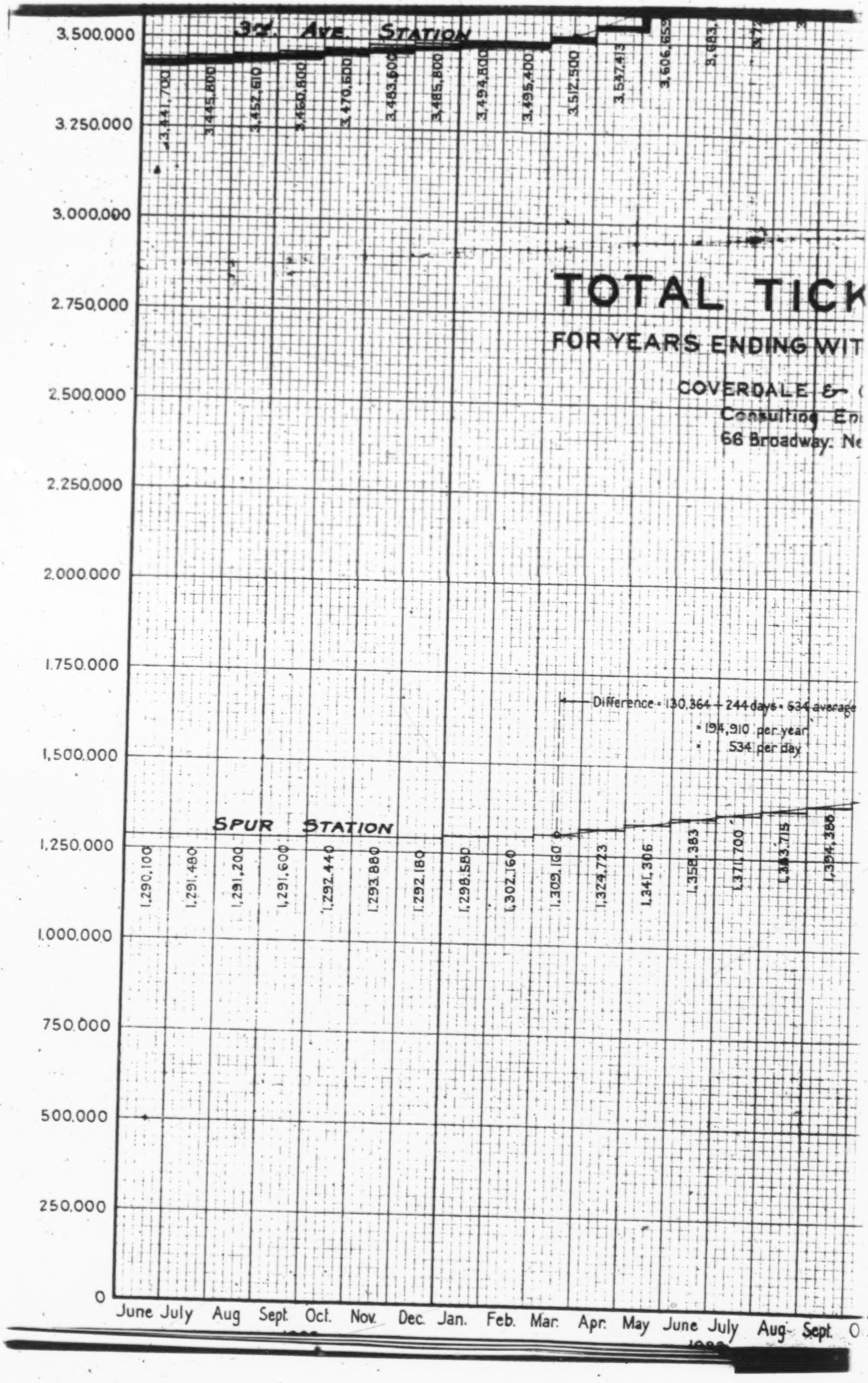


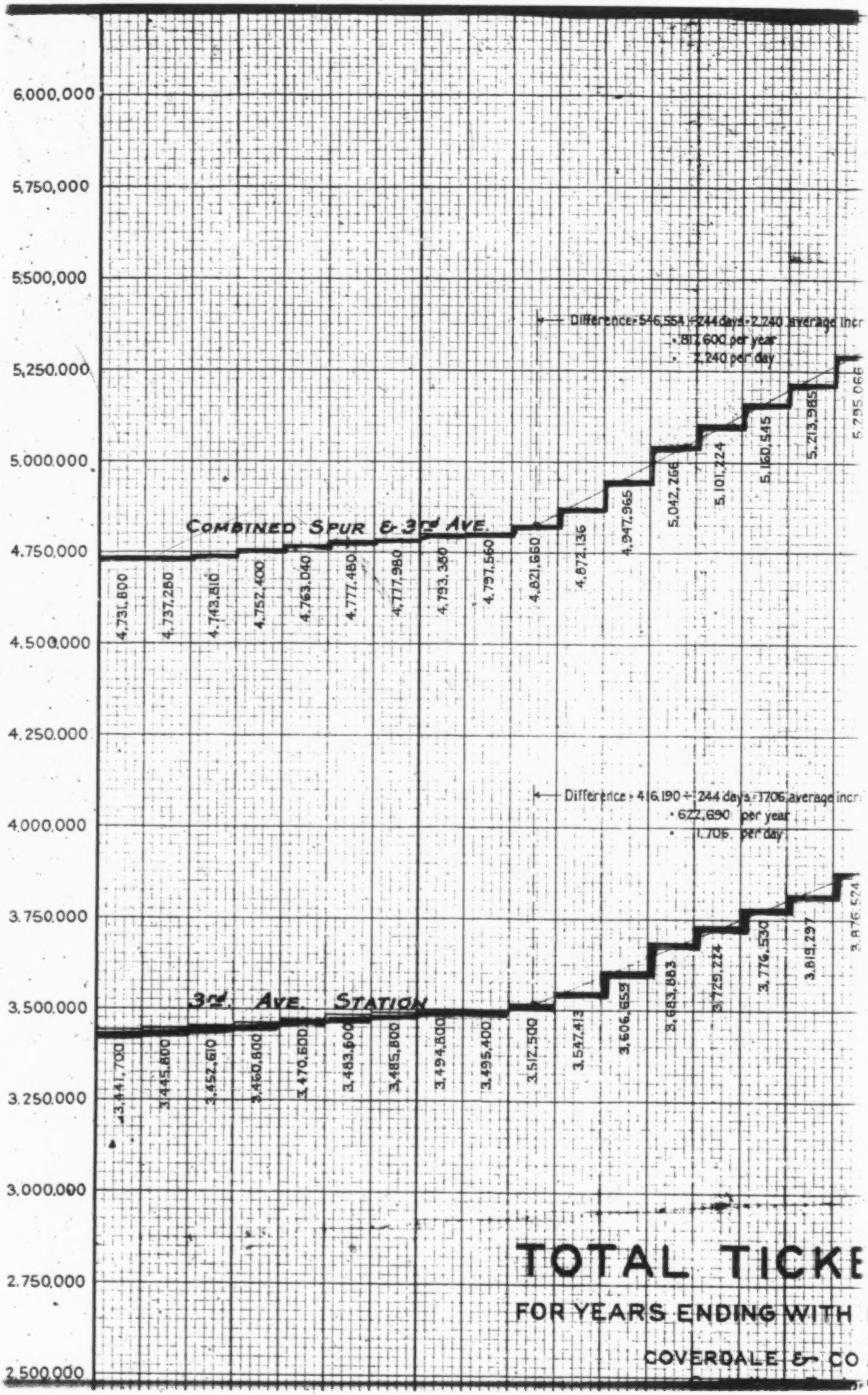
5752

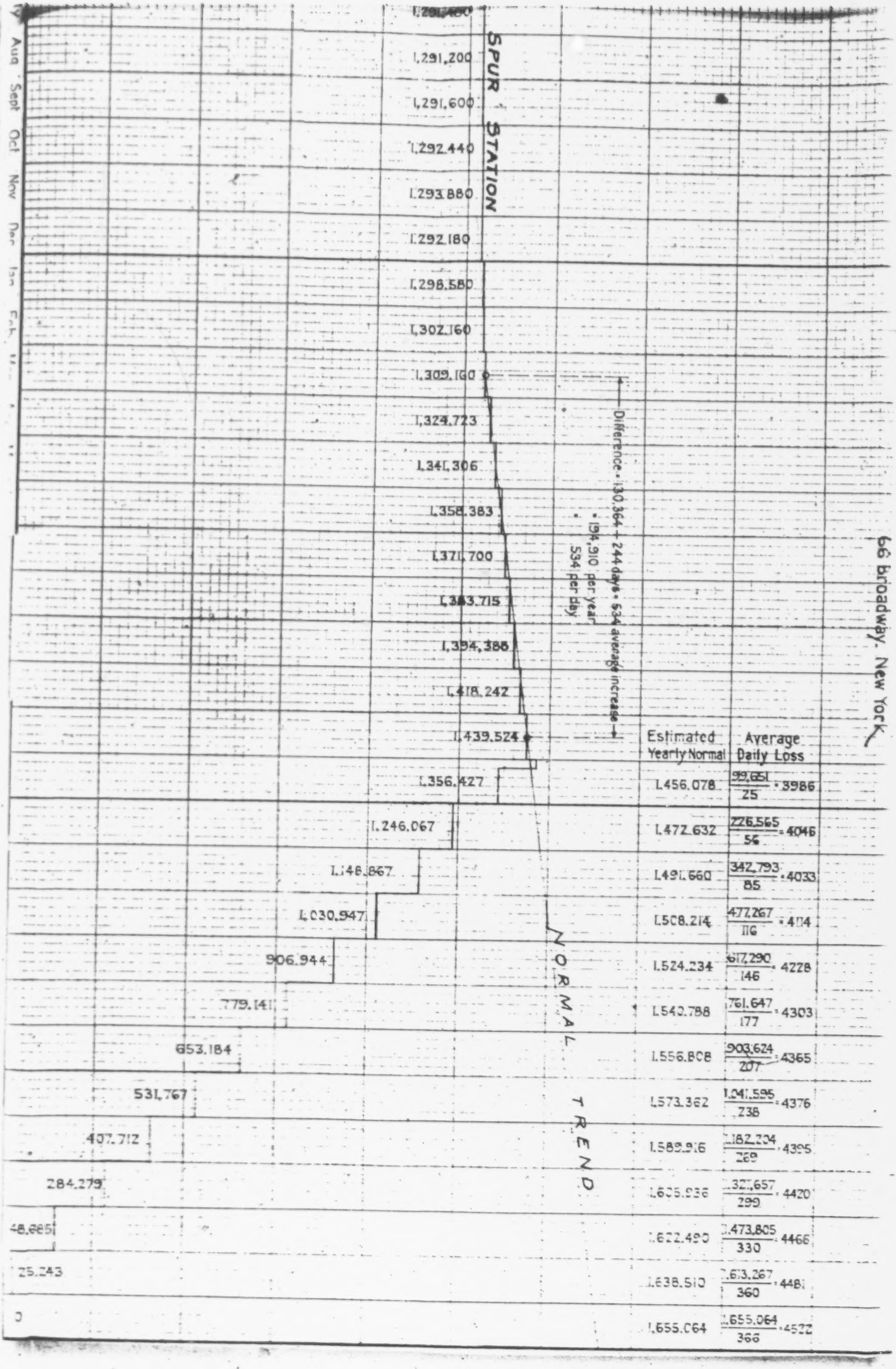
5753

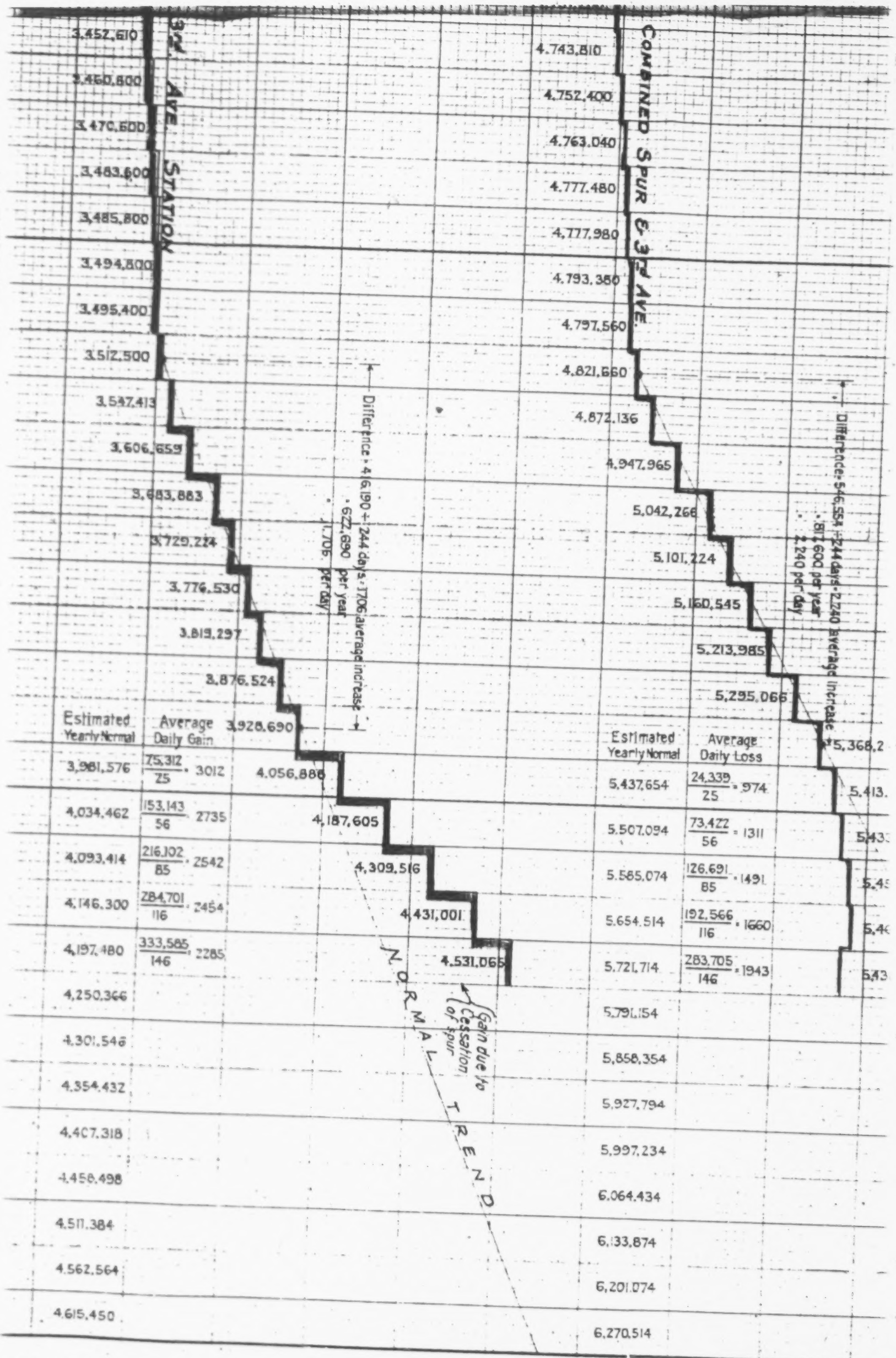
Claimants' Exhibit "K-5"—Chart Showing Ticket Sales for Years 1922 (June to December Both Inclusive), 1923 (January to December Both Inclusive) and 1924 (January to December Both Inclusive).

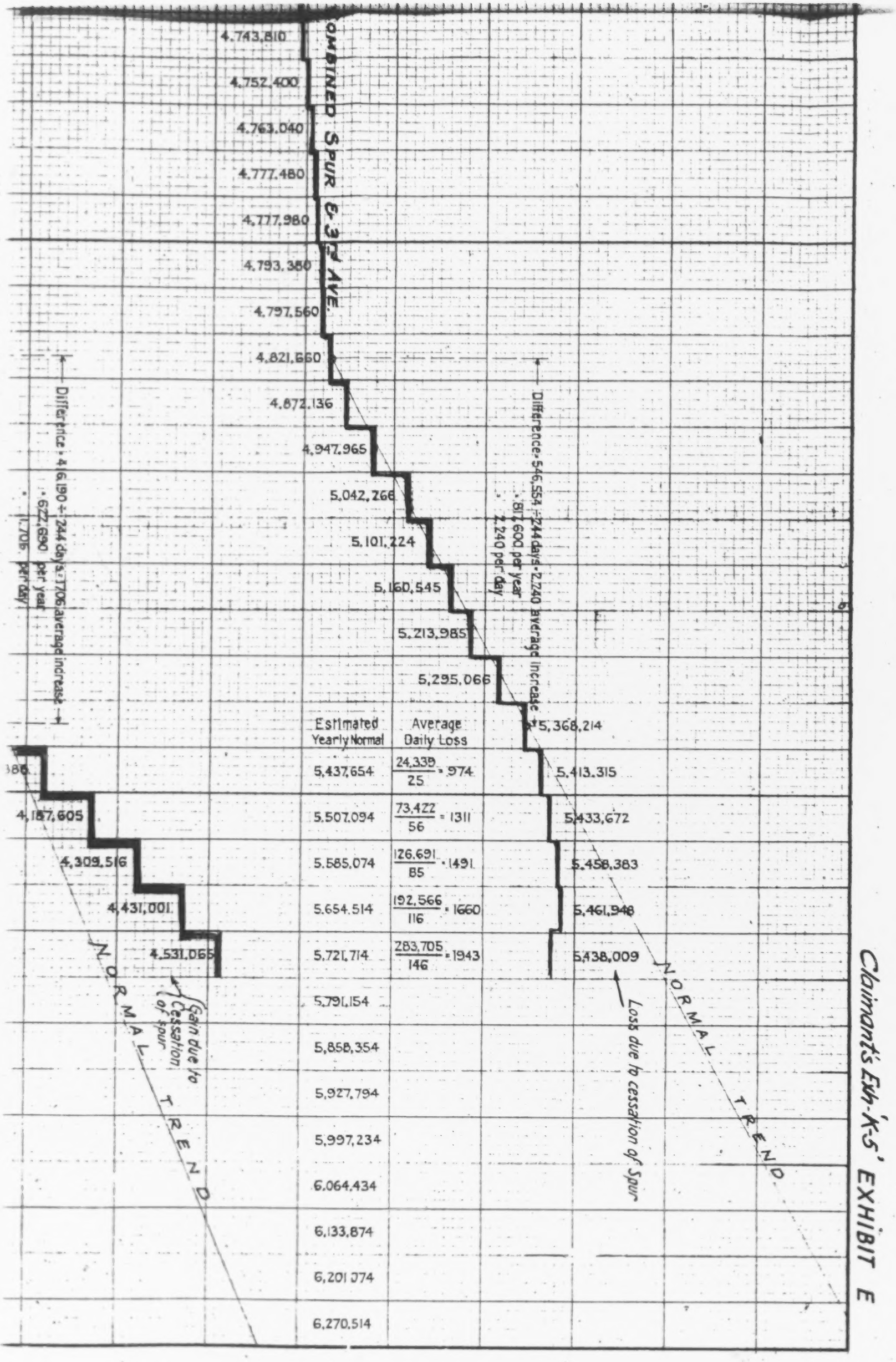
5754


32nd AVE. STATION
3,441,700
3,445,800
3,452,610
3,460,800
3,470,600
3,483,600
3,485,800
3,494,800
3,495,400
3,517,500
3,547,413
3,606,655
TOTAL TICK
FOR YEARS ENDING WIT
COVERDALE &
Consulting En
66 Broadway: Ne
Difference = 130,364 ÷ 244 days = 534 average
= 194,910 per year
= 534 per day
SPUR STATION
1,290,100
1,291,480
1,291,200
1,291,600
1,292,440
1,293,880
1,292,180
1,298,580
1,302,160
1,309,160
1,324,723
1,341,306
1,358,383
1,371,700
1,383,715
1,394,386
3,500,000
3,250,000
3,000,000
2,750,000
2,500,000
2,250,000
2,000,000
1,750,000
1,500,000
1,250,000
1,000,000
750,000
500,000
250,000
0
June July Aug Sept Oct. Nov. Dec. Jan. Feb. Mar. Apr. May June July Aug. Sept.


6,000,000
5,750,000
5,500,000
5,250,000
5,000,000
4,750,000
4,500,000
4,250,000
4,000,000
3,750,000
3,500,000
3,250,000
3,000,000
2,750,000
2,500,000
COMBINED SPUR & 3rd AVE.
3rd. AVE. STATION
4,731,800
4,737,280
4,743,810
4,752,400
4,763,040
4,777,480
4,777,980
4,793,380
4,797,560
4,821,660
4,872,136
4,947,965
5,042,266
5,101,224
5,160,545
5,213,985
5,295,066
3,441,700
3,445,800
3,452,610
3,460,800
3,470,600
3,483,600
3,485,800
3,494,800
3,495,400
3,512,500
3,547,413
3,606,659
3,683,883
3,725,224
3,776,530
3,819,297
3,876,524
Difference = 546,554 ÷ 244 days = 2,240 average incr
= 817,600 per year
= 2,240 per day
Difference = 416,190 ÷ 244 days = 1706 average incr
= 622,690 per year
= 1,706 per day
TOTAL TICKE
FOR YEARS ENDING WITH
COVERDALE & CO


Aug
Sept
Oct
Nov
Dec
Jan
Feb
1,291,200
1,291,600
1,292,440
1,293,880
1,292,180
SPUR STATION
1,298,580
1,302,160
1,309,160
1,324,723
1,341,306
1,358,383
1,371,700
1,383,715
1,394,386
1,418,242
1,439,524
Difference = 130,364 ÷ 244 days = 534 average increase
= 194,910 per year
534 per day
1,356,427
1,246,067
1,148,867
1,030,547
906,944
779,141
653,184
531,767
407,712
284,279
148,885
25,243
0
NORMAL TREND
Estimated Yearly Normal
Average Daily Loss
1,456,078 — 99,651 / 25 = 3986
1,472,632 — 226,565 / 56 = 4046
1,491,660 — 342,793 / 85 = 4033
1,508,214 — 477,267 / 116 = 4114
1,524,234 — 617,290 / 146 = 4228
1,540,788 — 761,647 / 177 = 4303
1,556,808 — 903,624 / 207 = 4365
1,573,362 — 1,041,595 / 238 = 4376
1,589,916 — 1,182,204 / 269 = 4395
1,605,936 — 1,321,657 / 299 = 4420
1,622,490 — 1,473,805 / 330 = 4466
1,638,510 — 1,613,267 / 360 = 4481
1,655,064 — 1,655,064 / 366 = 4522
66 Broadway, New York


3rd AVE. STATION
COMBINED SPUR & 3rd AVE.
3,452,610
3,460,800
3,470,600
3,483,600
3,485,800
3,494,800
3,495,400
3,512,500
3,547,413
3,606,659
3,683,883
3,729,224
3,776,530
3,813,297
3,876,524
3,928,690
4,056,886
4,187,605
4,309,516
4,431,001
4,531,066
4,743,810
4,752,400
4,763,040
4,777,480
4,777,980
4,793,380
4,797,560
4,821,660
4,872,136
4,947,965
5,042,266
5,101,224
5,160,545
5,213,985
5,295,066
5,368,2
Difference = 416,190 ÷ 244 days = 1706 average increase
622,690 per year
1,706 per day
Difference: 546,554 ÷ 244 days = 2240 average increase
817,600 per year
2,240 per day
Estimated Yearly Normal
Average Daily Gain
3,981,576
75,312/25 = 3012
4,034,462
153,143/56 = 2735
4,093,414
216,102/85 = 2542
4,146,300
284,701/116 = 2454
4,197,480
333,585/146 = 2285
4,250,366
4,301,546
4,354,432
4,407,318
4,458,498
4,511,384
4,562,564
4,615,450
NORMAL TREND
Gain due to Cessation of spur
Estimated Yearly Normal
Average Daily Loss
5,437,654
24,339/25 = 974
5,507,094
73,422/56 = 1311
5,585,074
126,691/85 = 1491
5,654,514
192,566/116 = 1660
5,721,714
283,705/146 = 1943
5,791,154
5,858,354
5,927,794
5,997,234
6,064,434
6,133,874
6,201,074
6,270,514
5,413.
5,43
5,4
5,4
5,43



Claimant's Exh-'K-5' EXHIBIT E

5758

5759

Claimants' Exhibit "K-6"—Chart Showing Ticket Sales at 42nd Street Spur, 42nd Street Station 3rd Avenue Line and Combined Spur and 3rd Avenue Stations for Years 1922, 1923 and 1924 (January to November Both Inclusive).

5760

Claimant's E

Gain due to Cessation of Spur

Loss due to Cessation of Spur

Exhibit E

Trend as per Exhibit E

Trend as per Exhibit E

3rd AVE.

NORTH

SPUR E- 3rd AVE.

700,000

600,000

500,000

400,000

300,000

EXHIBIT F

Claimant's Exh.- K-6

TICKET SALES

COVERDALE & COLPITTS
Consulting Engineers
66 Broadway, New York

SPUR E- 3rd AVE.

Normal Trend as per Exhibit E.

Loss due to Cessation of Spur

Gain due to Cessation of Spur

3rd AVE.

Normal Trend as per Exhibit E.

SPUR

Normal Trend as per Exhibit E.

LEGEND
- 42nd St Spur
- 42nd St Station
- Combined Spur and 3rd Ave. Stations

1922 | 1923 | 1924

Jan Feb Mar Apr May June July Aug Sep Oct Nov Dec

500,000 400,000 300,000 200,000 100,000

5764

5765

Claimants' Exhibit "K-7"—Chart Showing Ticket Sales at 42nd Street Spur, 42nd Street Station 3rd Avenue Line and Combined Spur and 3rd Avenue Stations for Fiscal Years (1900 to 1923 Both Inclusive) Ending June 30th.

5766

4,000,000

3,000,000

2,000,000

1,000,000

Combined Spur & 3rd Ave.

3rd Ave.

Normal Trend as per Exhibit E

Normal Trend as per Exhibit F

Claimants Exh K-7 EXHIBIT G

LEGEND

42nd St. Spur

42nd St. Station 3rd Ave. Line

Combined Spur & 3rd Ave. Stations

COVERDALE & COLPITTS
Consulting Engineers
66 Broadway, New York

1900 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934

TICKET SALES FISCAL YEARS ENDING JUNE 30TH

3,000,000

4,000,000

5,000,000

6,000,000

7,000,000

2,531

3,167,920

3,962,737

4,499,001

3,667,610

3,020,154

3,333,911

3,100,659

3,052,738

3,363,655

3,401,790

3,334,098

3,267,180

3,468,458

3,481,006

3,835,632

Combined Spur & 3rd Ave.

4,633,726

4,679,840

4,702,478

4,864,567

5,087,780

4,731,800

5,042,266

3,339,146

3,611,920

3,441,700

3,683,883

First Subway Opened

Elevated 3rd Tracking in Operation

Lexington Ave. Subway Opened

Spur Operation Discontinued 12 Midnight Decem
(Sales Estimated December 7th to 31st)

Normal Trend as per Exhibit E

Normal Trend as per Exhibit E

6,000,000

7,000,000

8,000,000

9,000,000

First Subway Opened

Elevated 3rd Tracking in Operation

Lexington Ave. Subway Opened

Spur Operation Discontinued 12 Midnight December 6,
(Sales Estimated December 7th to 31st)
Exhibit E

5770

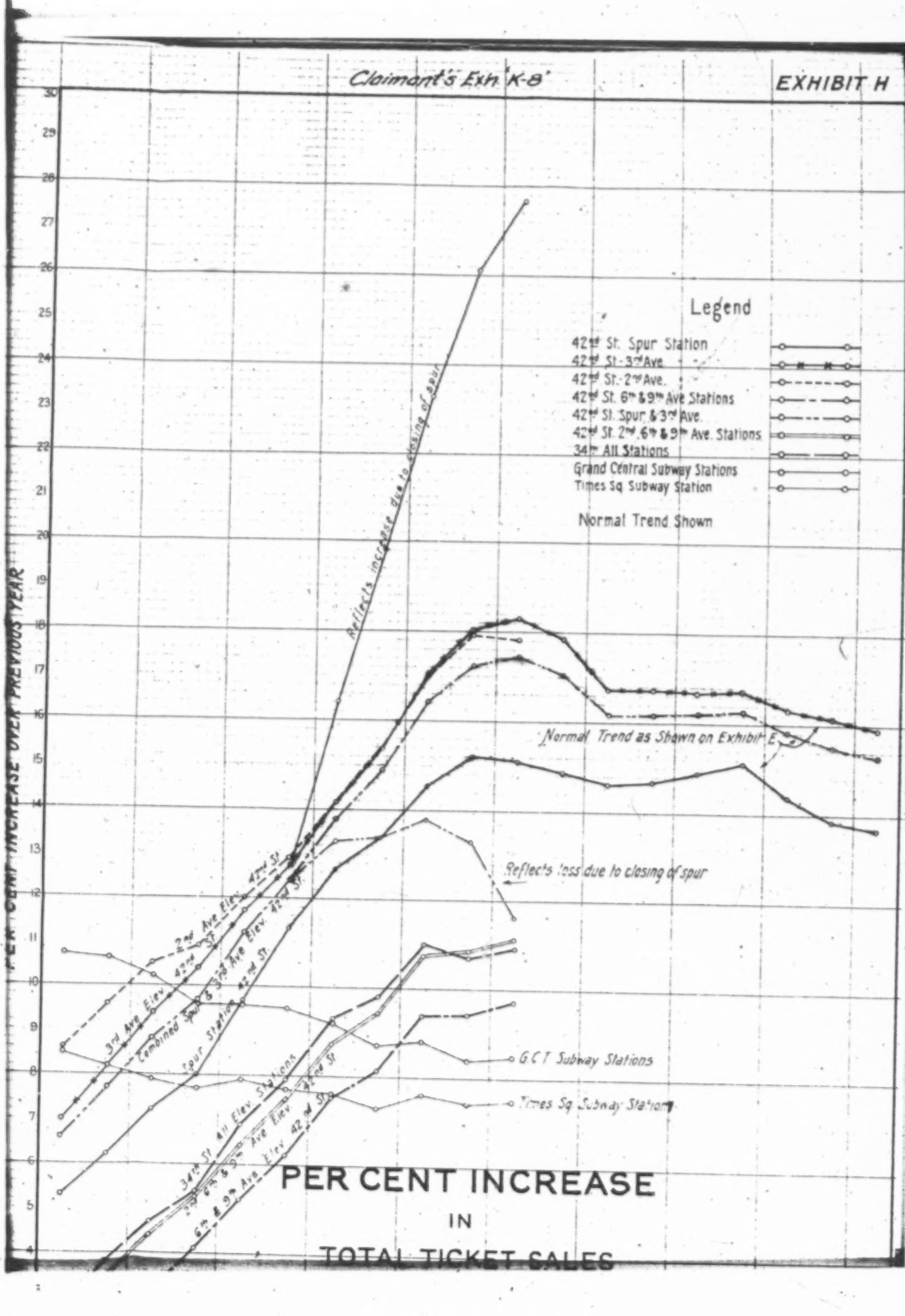
5771

Claimants' Exhibit "K-8"—Chart Showing Per Cent. Increase in Total Ticket Sales for Years Ending With Months Indicated Over Previous 12 Months Periods.

5772

Claimant's Exh. 'K-8'

EXHIBIT H



PER CENT INCREASE IN TOTAL TICKET SALES

PER CENT INCREASE IN TOTAL TICKET SALES

In Total Ticket Sales for Years Ending with Months indicated over previous 12 Month Periods

PER CENT INCREASE OVER PREVIOUS YEAR

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

June July Aug Sept Oct Nov Dec Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

1923

Legend

- 42nd St. Spur Station
- 42nd St.-3rd Ave.
- 42nd St.-2nd Ave.
- 42nd St. 6th & 9th Ave Stations
- 42nd St. Spur & 3rd Ave.
- 42nd St. 2nd, 6th & 9th Ave. Stations
- 34th All Stations
- Grand Central Subway Stations
- Times Sq Subway Station

Normal Trend Shown

Reflects increase due to closing of spur

Normal Trend as Shown on Exhibit E

Reflects loss due to closing of spur

42nd St. Spur Station

2nd Ave Elev. 42nd St.

3rd Ave Elev. 42nd St.

Combined Spur & 3rd Ave Elev. 42nd St.

34th St. 4th Elev. Stations

2nd 6th & 9th Ave Elev. 42nd St.

6th & 9th Ave Elev. 42nd St.

G.C.T Subway Stations

Times Sq Subway Station

5776

5777

Claimants' Exhibit "O"—Map Showing Routes of Interborough Rapid Transit Company.

5778

ROUTES OF THE INTERBOROUGH RAPID TRANSIT COMPANY.

HUDSON RIVER
EAST RIVER
HARLEM RIVER
EAST RIVER
HARLEM RIVER
SHIP CANAL
FLUSHING BAY
PELHAM BAY
WELFARE ISLAND
GOVERNORS ISLAND
CENTRAL PARK.
MANHATTAN
BROOKLYN
QUEENS
THE BRONX PARK
BROADWAY LINE.
LINE.
NINTH AVE. LINE.
SIXTH AVE. LINE.
FOURTH AVE.
CENTRAL
LEXINGTON AVE. LINE.
THIRD AVE. LINE.
SECOND AVE. LINE.
2ND AVE LINE.
4TH AVE. LINE.
NOSTRAND AVE. LINE.
BROOKLYN LINE.
JAMAICA LINE.
CORONA LINE.
ASTORIA LINE.
WHITE PLAINS ROAD
PELHAM PKWAY.
BRONX PK. EAST
BURKE AVE.
GUN HILL RD.
ALLERTON AVE.
BEDFORD PARK BOULEVARD
KINGSBRIDGE RD.
FORDHAM RD.
JEROME AVE.
ANDERSON AVE
JEROME AVE.
MOSHOLU PKWAY
CLAREMONT PKWAY.
CROTONA PARK
BOSTON ROAD
SOUTH FERRY
BATTERY PLACE
BOWLING GREEN
WALL ST.
FULTON ST.
FRANKLIN SQ.
CHATHAM SQ.
PARK PLACE
CITY HALL
BROOKLYN BRIDGE
BOROUGH HALL.
HOYT ST.
NEVINS ST.
ATLANTIC AVE.
LONG ISLD R.R. DEPOT.
BERGEN ST.
PROSPECT PARK PLAZA
EASTERN PKWAY. BKLYN. MUSEUM.
FRANKLIN AVE.
PRESIDENT ST.
STERLING ST.
WINTHROP ST.
CHURCH AVE.
BEVERLEY RD.
NEWKIRK AVE.
FLATBUSH AVE.
NOSTRAND AVE.
KINGSTON AVE.
UTICA AVE.
SUTTER AVE.
SARATOGA AVE.
ROCKAWAY AVE.
JUNIUS ST.
PENNSYLVANIA AVE.
VAN SICLEN AVE.
NEW LOTS AVE.
CLARK ST. BKLYN. HTS.
PROSPECT PARK
GREEN-WOOD CEMETERY
CYPRESS HILLS CEMETERY
FOREST PARK
NEW CALVARY CEMETERY
ST. RAPHAELS CEMETERY
ST. MICHAELS CEMETERY
CITY HALL.
CANAL ST.
GRAND ST.
CHAMBERS ST.
FRANKLIN ST.
WARREN ST.
BARCLAY ST.
CORTLANDT ST.
RECTOR ST.
CHRISTOPHER ST.
HOUSTON ST.
SPRING ST.
BLEECKER ST.
ASTOR PLACE
BLEECKER ST.
SEVENTH
HOUSTON ST.
CANAL ST. LINE.
AQUARIUM.
PENNSYLVANIA R.R. DEPOT.
PENNSYLVANIA R.R. TUNNELS
NINTH AVE. ELEVATED
SIXTH AVE. ELEVATED
59TH ST. COLUMBUS CIRCLE.
MUSEUM OF NATURAL HISTORY.
53RD ST. & 6TH AVE.
5TH AVE.
MET. MUSEUM OF ART
PUBLIC LIBRARY
MADISON SQ. GARDEN
N.Y.C.R.R. DEPOT.
GRAND CENTRAL
TIMES SQUARE
42ND ST.
34TH ST. FERRY.
23RD ST.
14TH ST.
8TH ST.
1ST ST.
VERNON & JACKSON AVES.
HUNTERS PT. AVE.
COURT HOUSE SQ. L.I.C.
QUEENSBORO PLAZA.
RAWSON ST.
LOWERY ST.
BLISS ST.
BEEBE AVE.
WASHINGTON AVE.
BROADWAY
GRAND AVE.
HOYT AVE. ASTORIA AVE.
ASTORIA
DITMARS AVE.
LINCOLN AVE.
WOODSIDE
FISK AVE.
BROADWAY
JACKSON HTS. 25TH ST.
ELMHURST AVE.
JUNCTION AVE.
ALBURTIS AVE.
111TH ST.
WILLETTS PT. BOULEVARD
MAIN ST. FLUSHING
COLLEGE POINT
WHITESTONE
BRIDGE
TRIBORO BRIDGE
BROADWAY
145TH ST.
135TH ST.
125TH ST.
116TH ST.
110TH ST.
103RD ST.
96TH ST.
86TH ST.
79TH ST.
72ND ST.
66TH ST.
59TH ST.
50TH ST.
42ND ST.
34TH ST.
30TH ST.
23RD ST.
18TH ST.
14TH ST.
CHRISTOPHER ST.
110TH ST. CATHEDRAL OF ST. JOHN THE DIVINE
116TH ST. COLUMBIA UNIV.
125TH ST.
137TH ST. CITY COLLEGE
145TH ST.
157TH ST.
168TH ST.
181ST ST.
191ST ST.
DYCKMAN ST.
207TH ST.
215TH ST.
225TH ST.
231ST ST.
POLO GROUNDS
SEDGWICK AVE.
HARLEM RIVER
YANKEE STADIUM
MOTT AVE.
149TH ST.
161ST ST.
167TH ST.
170TH ST.
MT. EDEN AVE.
176TH ST.
N.Y. UNIVERSITY
183RD ST.
FORDHAM RD.
KINGSBRIDGE RD.
BEDFORD PARK BOULEVARD
200TH ST.
204TH ST.
WILLIS AVE.
225TH ST.
BROOK AVE.
CYPRESS AVE.
E. 143RD ST.
LONGWOOD AVE.
HUNTS PT. AVE.
WHITLOCK AVE.
ELDER AVE.
SOUND VIEW AVE.
ST. LAWRENCE AVE.
E. 177TH ST.
CASTLE HILL AVE.
ZEREGA AVE.
WESTCHESTER SQ.
MIDDLETOWN RD.
BUHRE AVE.
PELHAM BAY PARK
JACKSON AVE.
PROSPECT AVE.
INTERVALE AVE.
SIMPSON ST.
FREEMAN ST.
LENOX
174TH ST.
177TH ST.
E. 180TH ST.
BRONX PARK
BRONX PK. EAST
PELHAM PKWAY.
ALLERTON AVE.
BURKE AVE.
GUN HILL RD.
E. 219TH ST.
E. 225TH ST.
CLAREMONT PKWAY.
174TH ST.
TREMONT AVE.
180TH ST.
183RD ST.
FORDHAM ROAD
BRONX PARK
200TH ST.
MOSHOLU PKWAY
BOSTON ROAD
PELHAM BAY PARK

SUBWAY DIVISION — LOCAL — EXPRESS
ELEVATED DIVISION
JOINTLY OPERATED
UNDER CONSTRUCTION

ROUTES OF THE INTERBOROUGH RAPID TRANSIT COMPANY.

HUDSON RIVER
EAST RIVER
HARLEM RIVER
EAST RIVER
SHIP CANAL
CENTRAL PARK.
WELFARE ISLAND
MANHATTAN
BROOKLYN
QUEENS
THE BRONX
VAN CORTLANDT PARK
PELHAM BAY PARK.
CROTONA PARK
BRONX PARK
WOODLAWN CEMETERY
LOCAL
EXPRESS

5782 **Claimants' Exhibits "R," "R-1," "R-2," "R-3," "R-4," "R-5," "R-6," "R-7," "R-8," "R-9," "R-10," "R-11," "R-12" and "R-13"—Fourteen (14) Photographs Showing Structure Before Spur Demolition.**

Claimants' Exhibit "R"—Photograph showing south platform of station on Park Avenue and 42nd Street looking east.

Claimants' Exhibit "R-1"—Photograph showing north platform of station on Park Avenue and 42nd Street looking east.

Claimants' Exhibit "R-2"—Photograph showing station at 3rd Avenue and 42nd Street taken from south track on 42nd Street looking east.

Claimants' Exhibit "R-3"—Photograph showing elevated station at Park Avenue and 42nd Street looking west.

Claimants' Exhibit "R-4"—Photograph showing south side of elevated
5783 structure on 42nd Street looking east towards 3rd Avenue.

Claimants' Exhibit "R-5"—Photograph showing north track along 42nd Street looking east from Park Avenue.

Claimants' Exhibit "R-6"—Photograph showing south track along 42nd Street looking east from Park Avenue.

Claimants' Exhibit "R-7"—Photograph showing centre of tracks along 42nd Street looking east from Park Avenue.

Claimants' Exhibit "R-8"—Photograph showing southwest corner of Lexington Avenue and 42nd Street looking southwest.

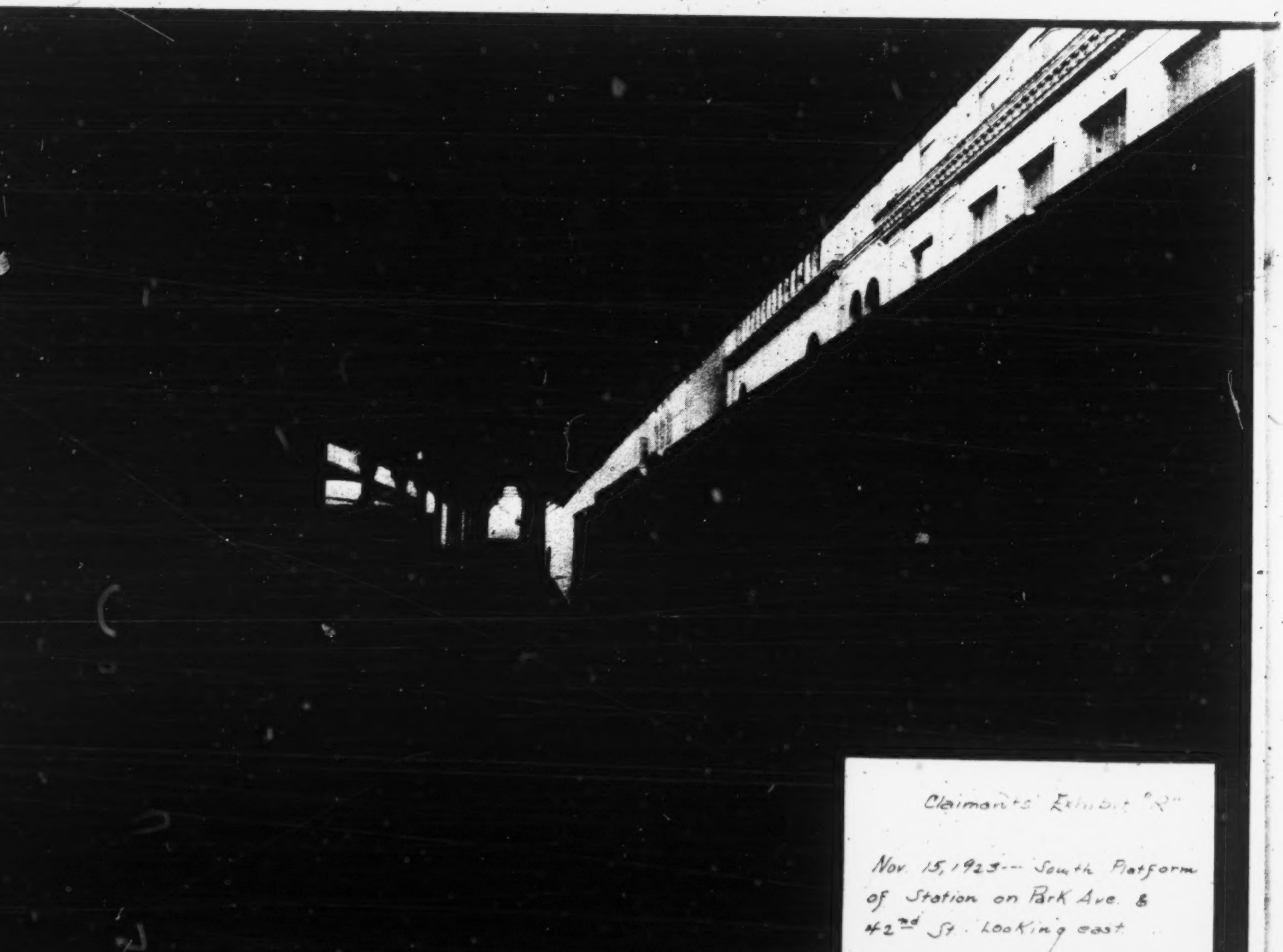
Claimants' Exhibit "R-9"—Photograph showing southeast corner of Lexington Avenue and 42nd Street looking northwest.

Claimants' Exhibit "R-10"—Photograph showing elevated R. R. structure on 42nd Street looking west from 3rd Avenue.

5784 Claimants' Exhibit "R-11"—Photograph showing southwest corner of 3rd Avenue and 42nd Street taken from station looking south.

Claimants' Exhibit "R-12"—Photograph showing station on north side of 42nd Street and 3rd Avenue looking west.

Claimants' Exhibit "R-13"—Photograph showing northwest corner of Lexington Avenue and 42nd Street looking northwest.



Claimant's Exhibit "2"

Nov. 15, 1923 --- South Platform of Station on Park Ave. & 42nd St. Looking east

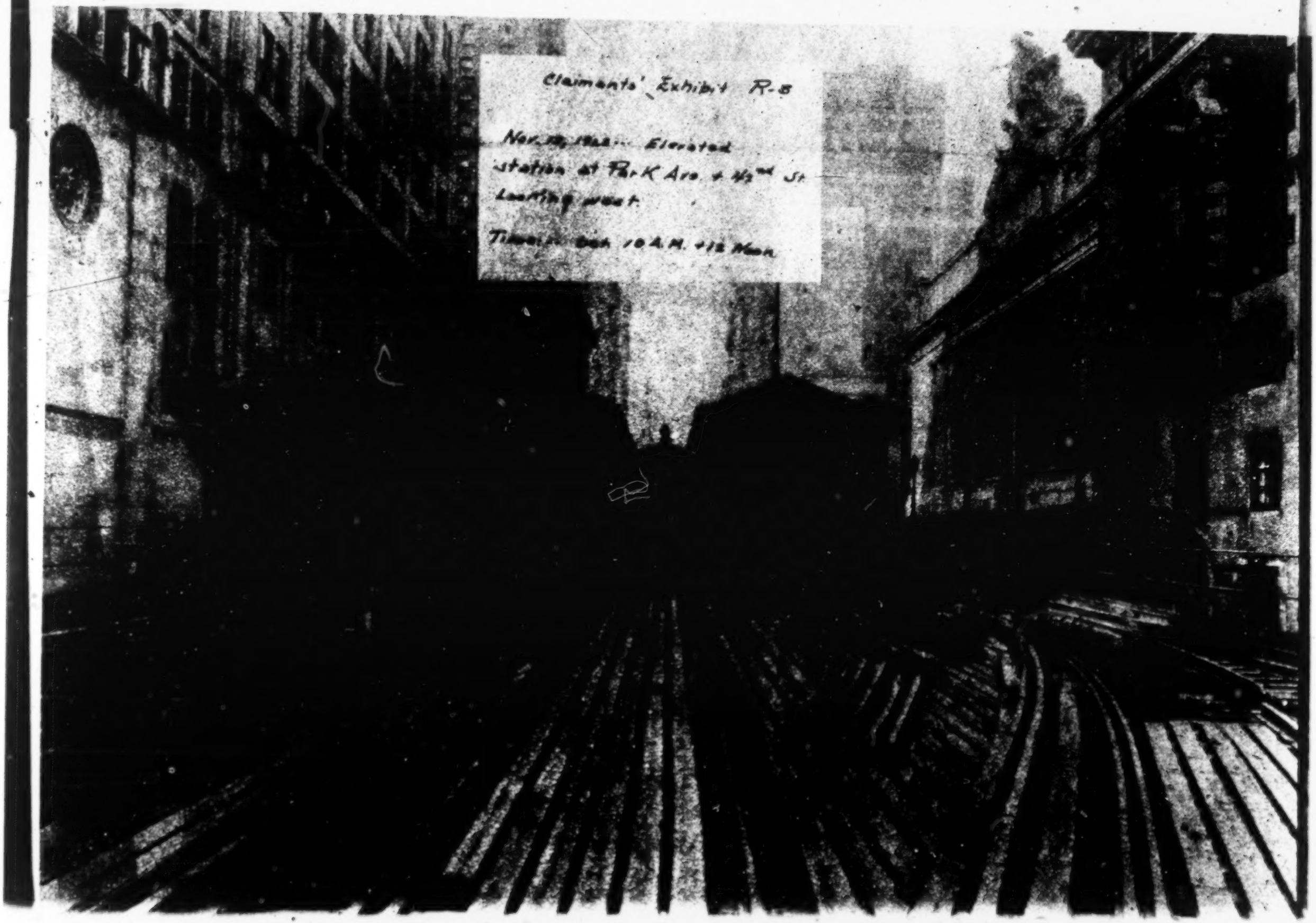


Claimants' Exhibit R. 2

Nov. 15, 1923:-- Station at 3rd Ave. & 42nd St. Taken from south track on 42nd St. Looking east.

Time:- bet. 10 & 11:30 A.M.



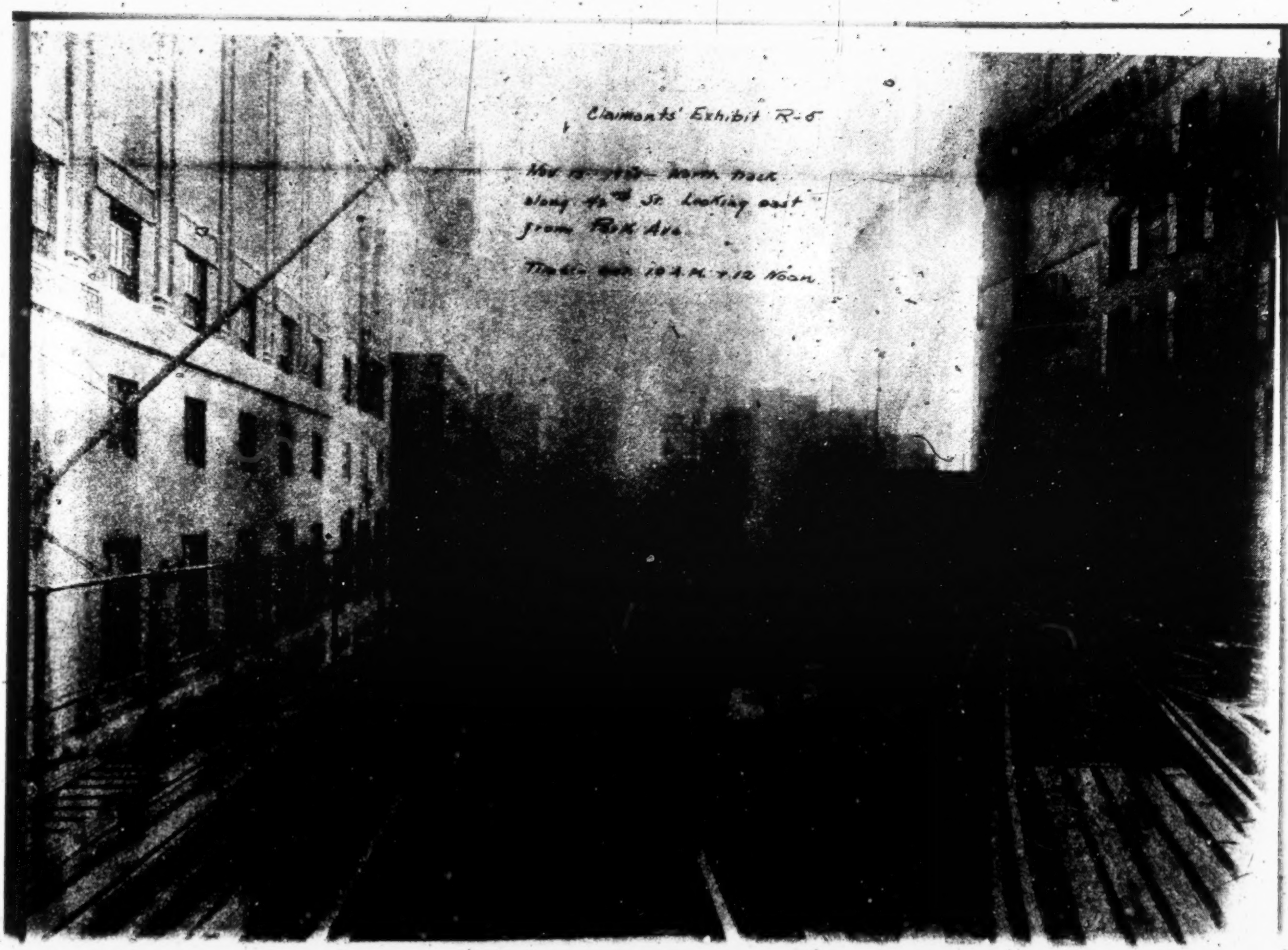

Claimants' Exhibit R-5
Nov. 19, 1918 ... Elevated
station at Park Ave. & 42nd St.
Looking west.
Time: 9:00 A.M. to 12 Noon.

Claimants' Exhibit R-4

Nov. 13, 1923 -- South side of Elevated Structure on 42nd St. Looking east toward 3rd Ave.

Time:- bet. 11 A.M. & 1 P.M.




Claimants' Exhibit R-6
Mar 19-1913 – Norm Nash
along 4th St. Looking east
from Polk Ave.
Time – 10 A.M. & 12 Noon

Claimants' Exhibit R-6

Nov 28, 1922:-- South Track
along 7th St. Looking
east from Park Ave.

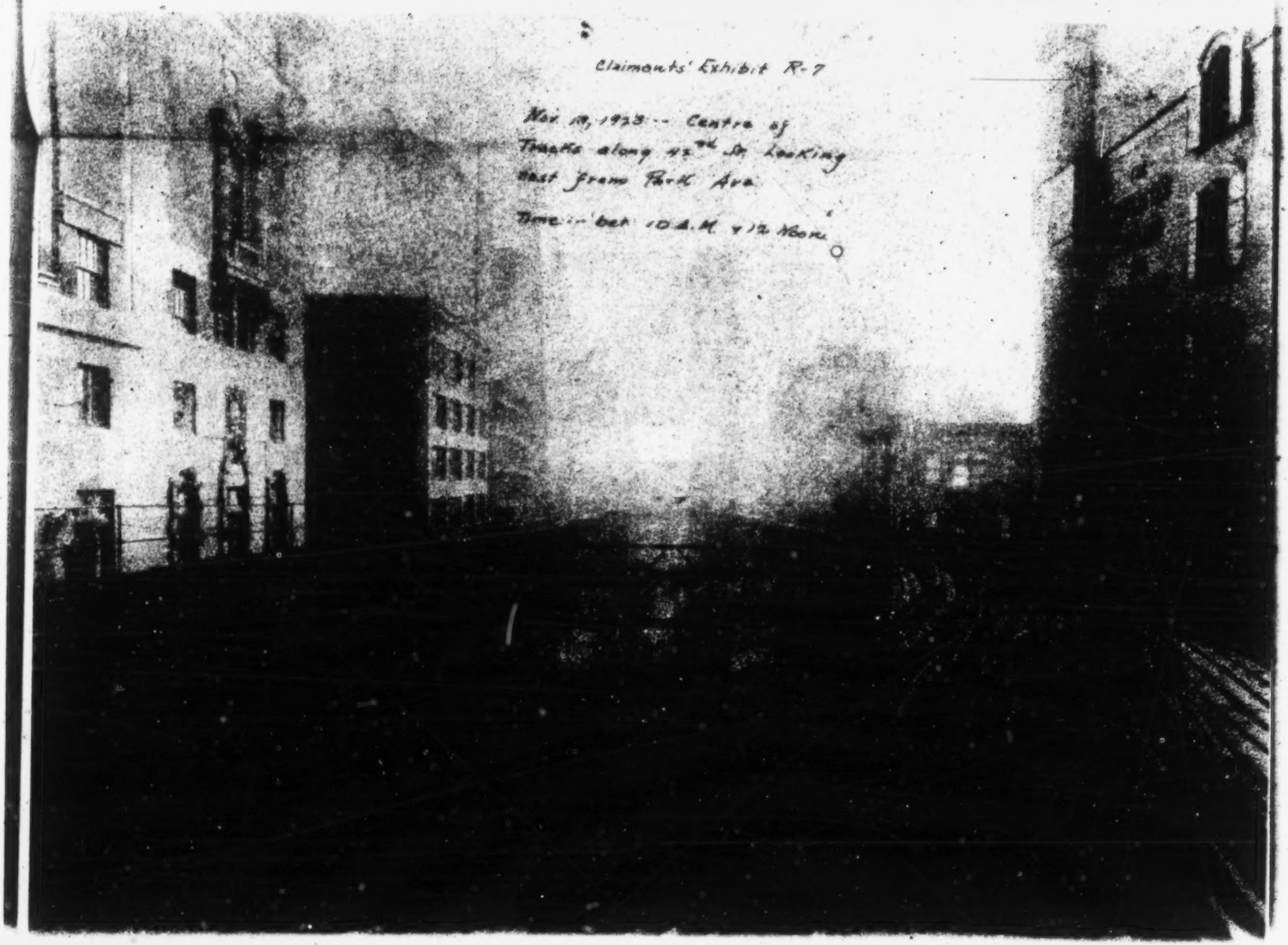
Time:-- bet 10 A.M. & 12 Noon

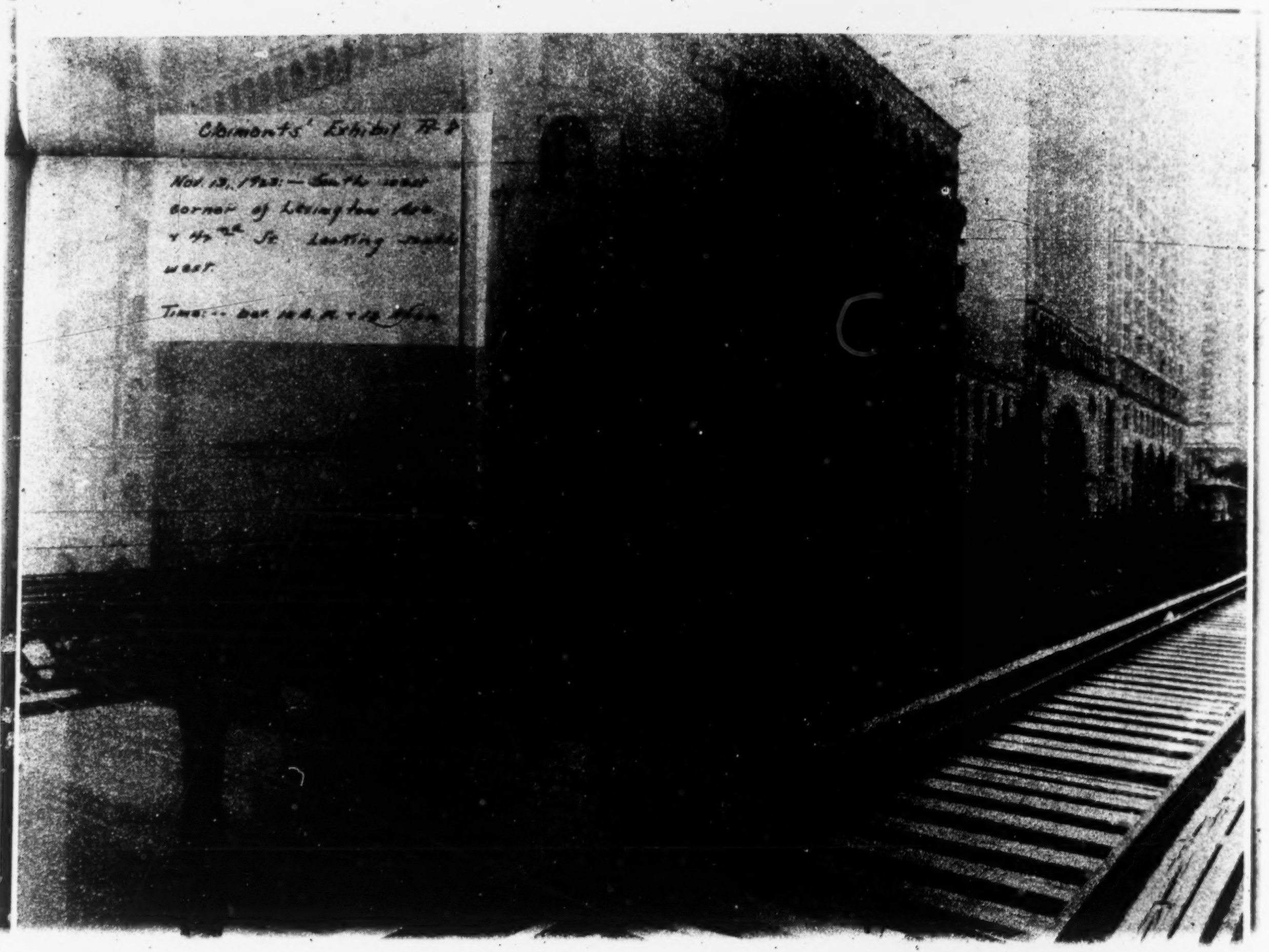


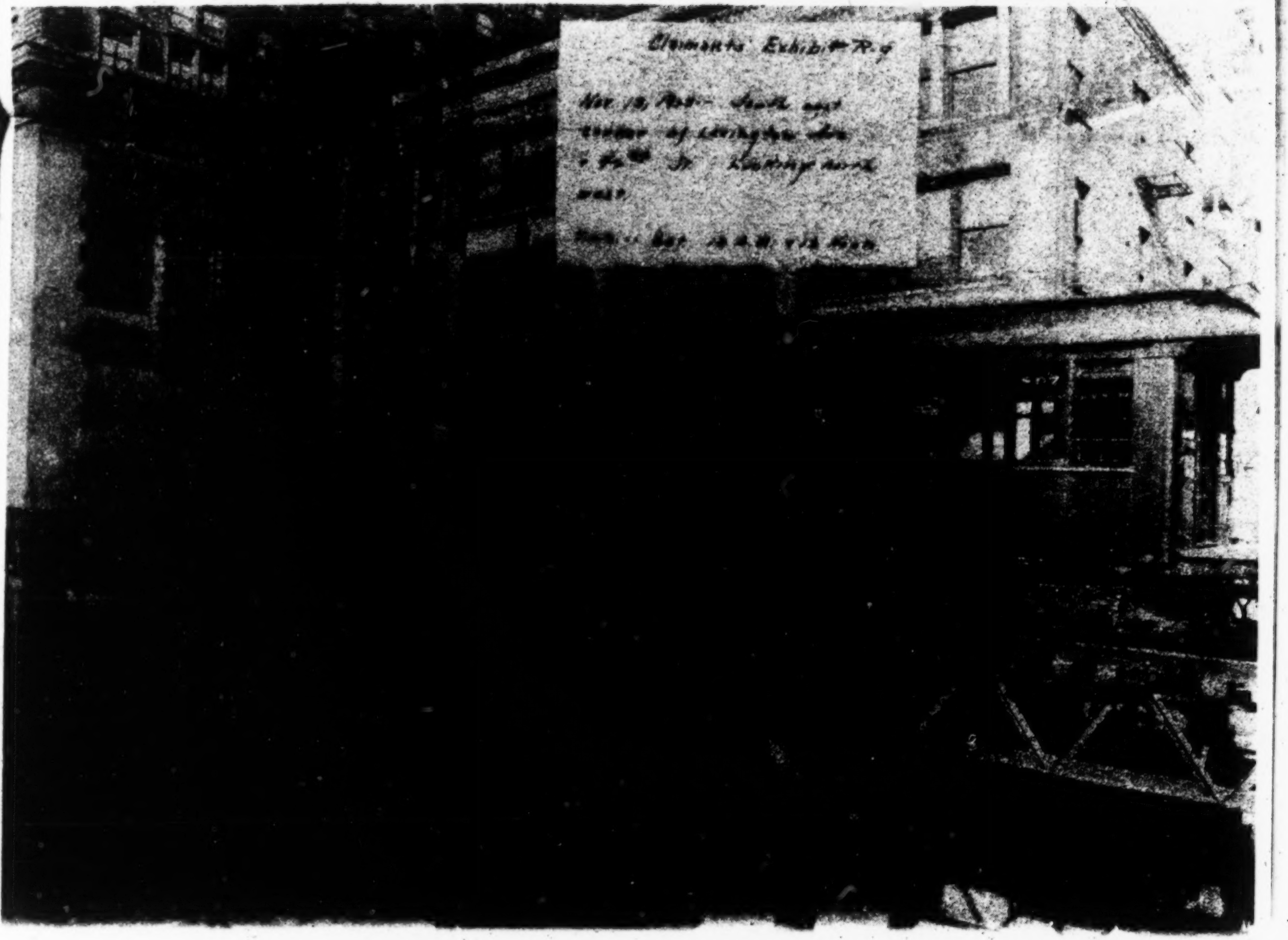
Claimants' Exhibit R-7

Nov 19, 1923 -- Centre of
Tracks along 42nd St Looking
East from Park Ave

Time -- bet 10 A.M & 12 Noon




Claimants' Exhibit No 8
Nov 13, 1923:— South west
corner of Lexington Ave.
& 42nd St. Looking south
west.
Time:-- Bet 10 A.M. & 12 Noon.


Claimants Exhibit No. 9

Claimants' Exhibit R.10

Nov. 12, 1931 -- Elevated R.R.
Structure on 42nd St.
Looking west from 3rd Ave.

Time -- Bet. 10 A.M. & 12 Noon.



Claimants' Exhibit R-11

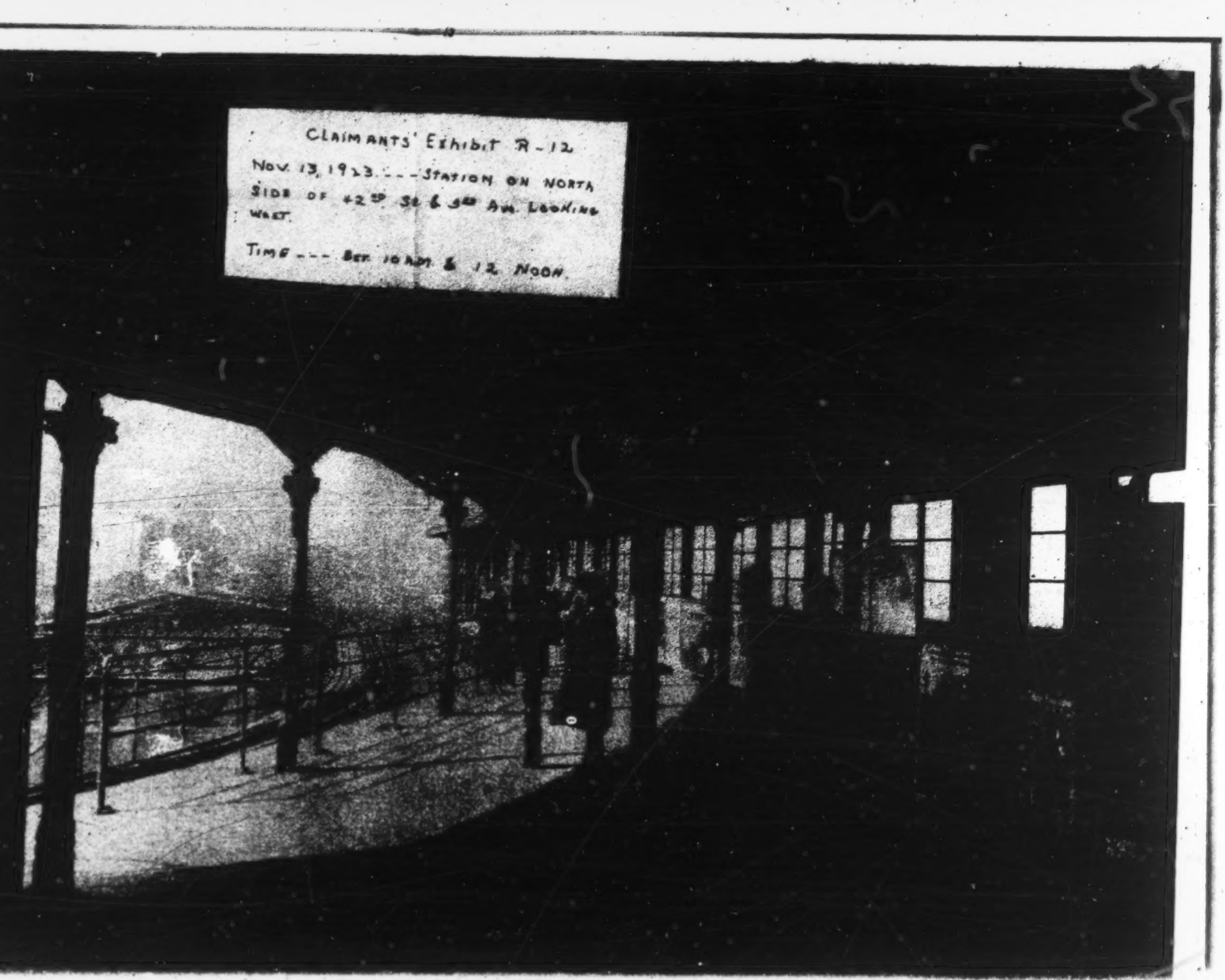
Nov. 13, 1929:- South west corner of 3rd Ave. & 42nd St. Taken from station Looking South

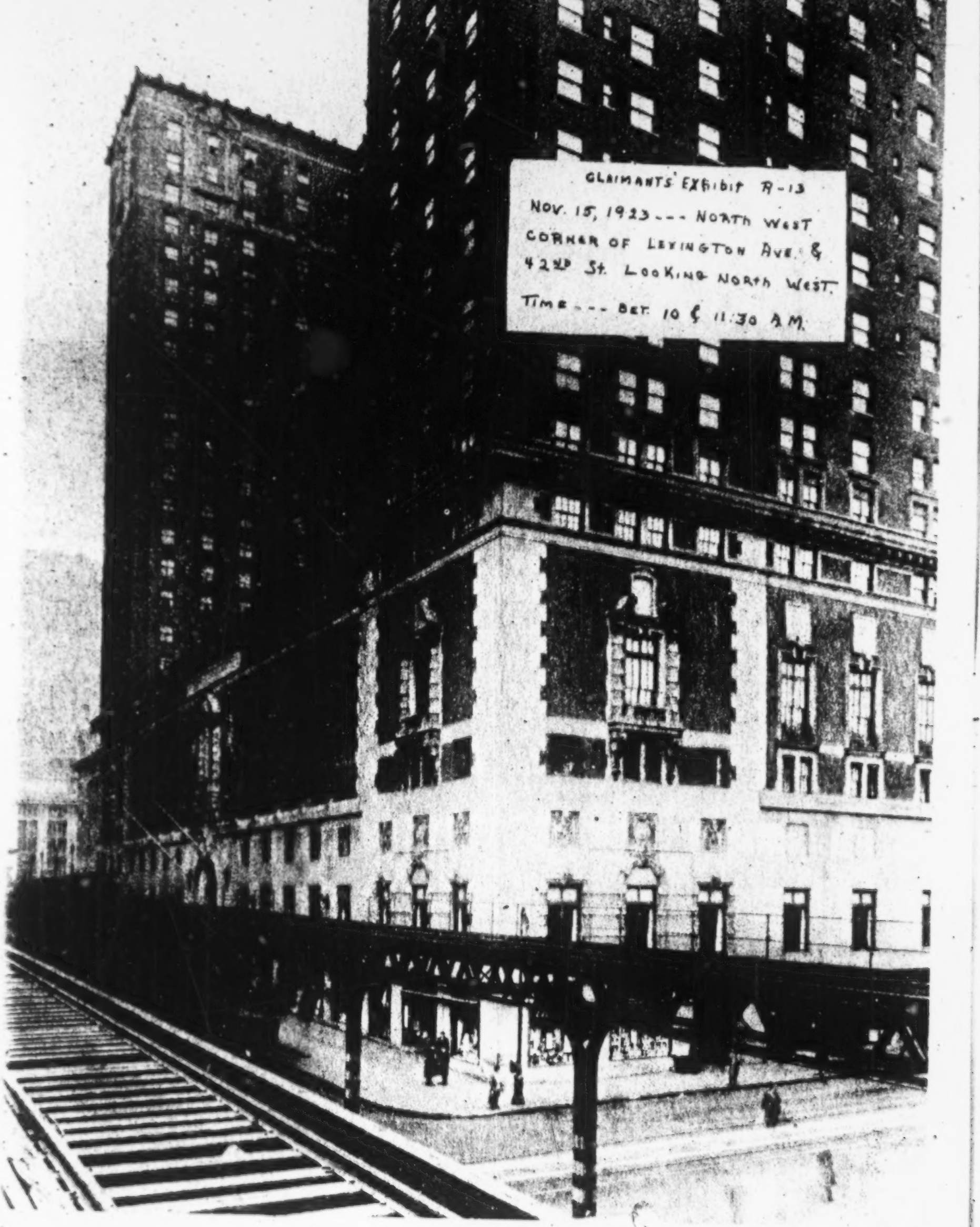
Time:- bet. 10 A.M. & 12 Noon.

CLAIMANTS' EXHIBIT R-12

NOV. 13, 1923. --- STATION ON NORTH SIDE OF 42ND ST & 3RD AVE. LOOKING WEST.

TIME --- BET. 10 A.M. & 12 NOON.




CLAIMANTS' EXHIBIT R-13
NOV. 15, 1923 --- NORTH WEST
CORNER OF LEXINGTON AVE. &
42ND ST. LOOKING NORTH WEST.
TIME --- BET. 10 & 11:30 A.M.

5788 **Claimants' Exhibits "S," "S-1," "S-2," "S-3," "S-4," "S-5," "S-6," "S-7," "S-8," "S-9," "S-10," "S-11," "S-12," "S-13," "S-14," "S-15" and "S-16"—Seventeen (17) Photographs of Properties After Structure Removal.**

Claimants' Exhibit "S"—Photograph showing north side of 42nd Street looking west from Lexington Avenue.

Claimants' Exhibit "S-1"—Photograph showing buildings #158-156-154-152 East 42nd Street looking south.

Claimants' Exhibit "S-2"—Photograph showing 42nd Street looking west from 3rd Avenue.

Claimants' Exhibit "S-3"—Photograph showing north side of 42nd Street looking northeast from Lexington Avenue.

Claimants' Exhibit "S-4"—Photograph showing buildings #153-151-
5789 149-147-145 East 42nd Street looking north.

Claimants' Exhibit "S-5"—Photograph showing intersection of Lexington Avenue and 42nd Street looking east.

Claimants' Exhibit "S-6"—Photograph showing buildings #141-139-137-135 East 42nd Street looking north.

Claimants' Exhibit "S-7"—Photograph showing 3rd Avenue and 42nd Street looking east.

Claimants' Exhibit "S-8"—Photograph showing 42nd Street side of northwest corner of 42nd Street and 3rd Avenue looking northeast.

Claimants' Exhibit "S-9"—Photograph showing front of Hotel Commodore looking east.

Claimants' Exhibit "S-10"—Photograph showing 42nd Street side of southeast corner of 42nd Street and Park Avenue looking southeast.

5790 Claimants' Exhibit "S-11"—Photograph showing intersection of Lexington Avenue and 42nd Street looking west.

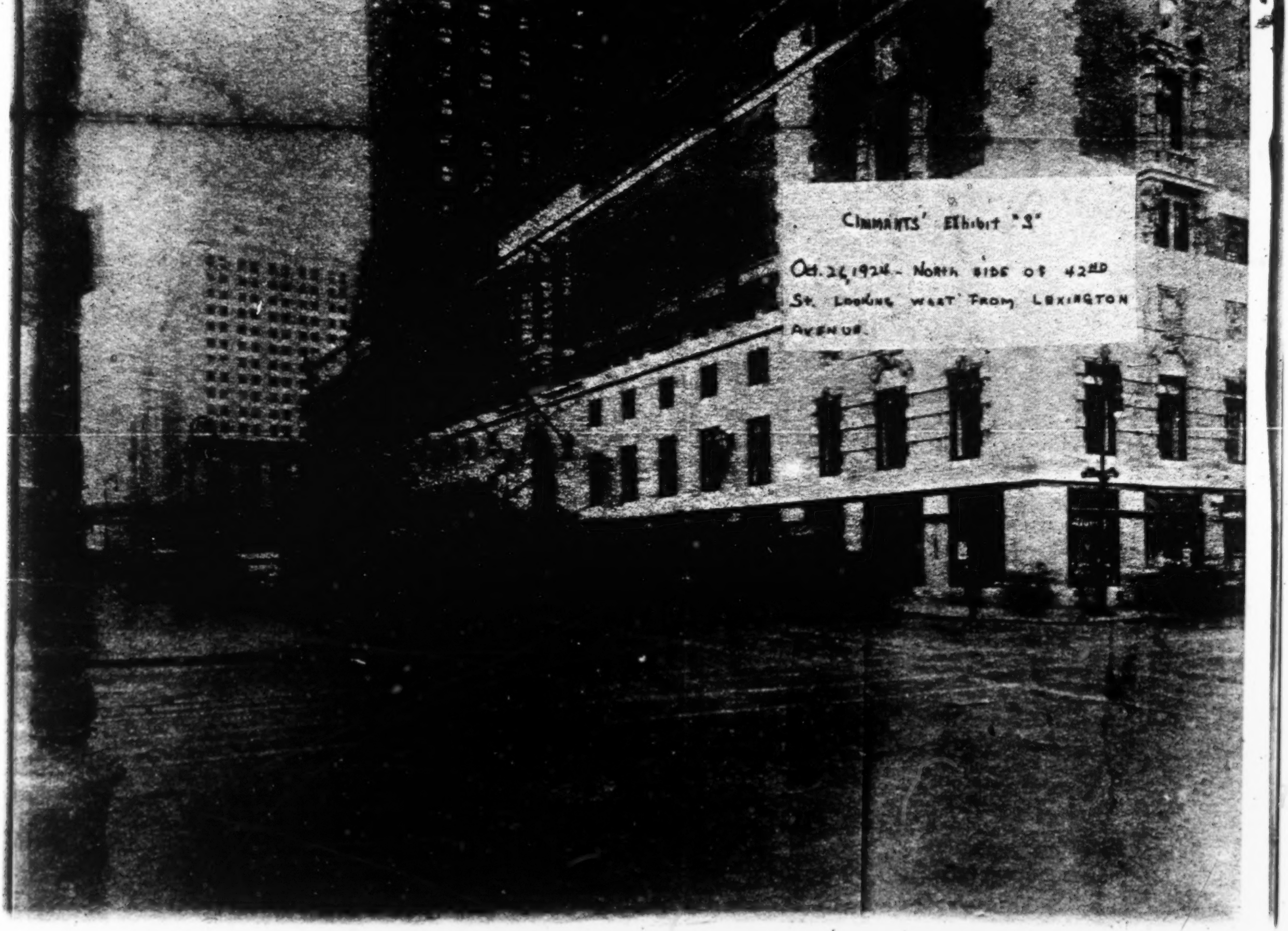
Claimants' Exhibit "S-12"—Photograph showing south side of 42nd Street looking west from Lexington Avenue.

Claimants' Exhibit "S-13"—Photograph showing buildings #146-144-142-140-138-136 East 42nd Street looking south.

Claimants' Exhibit "S-14"—Photograph showing 42nd Street looking east from Park Avenue.

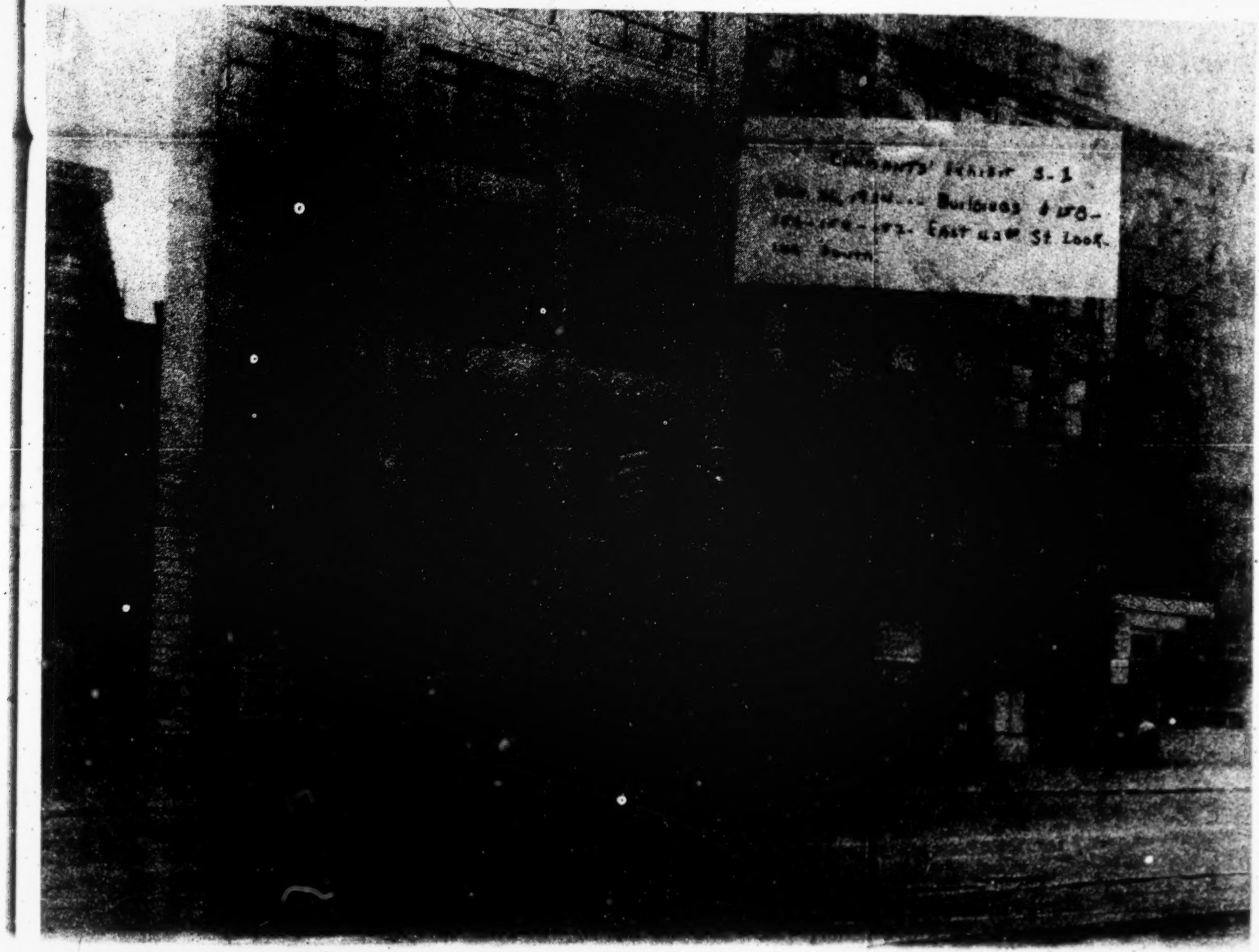
Claimants' Exhibit "S-15"—Photograph showing south side of 42nd Street looking southeast from Lexington Avenue.

Claimants' Exhibit "S-16"—Photograph showing 42nd Street side of southwest corner of 42nd Street and 3rd Avenue looking south.



CLIMMANTS' Exhibit "2"

Oct. 26, 1926 - North side of 42ND St. Looking West from Lexington Avenue.

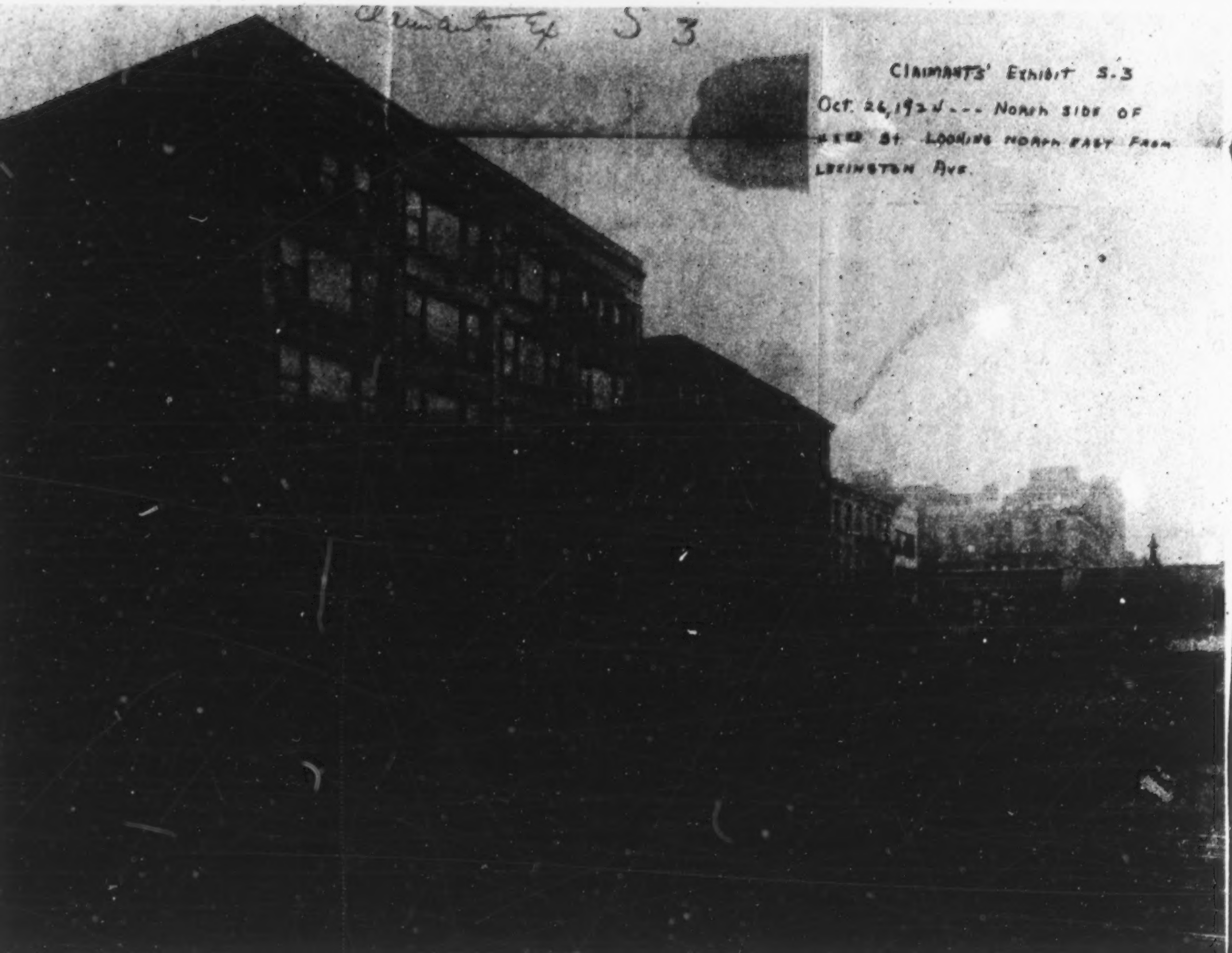

Exhibit S-1
Burlough
East 42nd St Look.


CLAIMANTS' EXHIBIT S-2
Oct. 26, 1924 --- 42ND St. LOOKING WEST FROM 3RD AVENUE

Claimants Ex S 3

CLAIMANTS' EXHIBIT S.3

Oct. 24, 1924 --- NORTH SIDE OF 116TH ST. LOOKING NORTH EAST FROM LEXINGTON AVE.



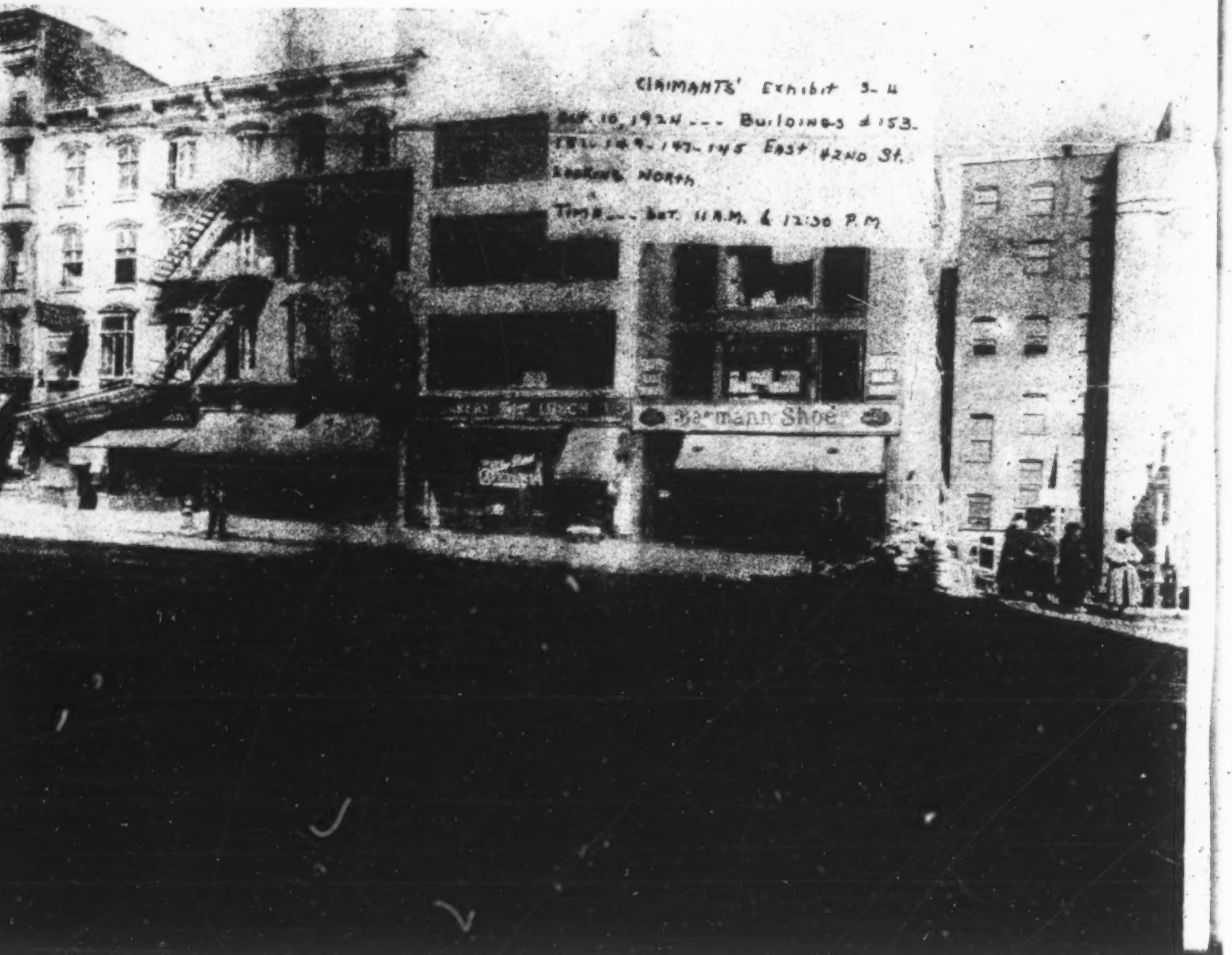
CLAIMANTS' Exhibit 3-4

DAT. 10, 1924 --- BUILDINGS # 153.

TEL. 148-147-145 EAST #2ND ST.

LOOKING NORTH

TIME --- BET. 11 A.M. & 12:30 P.M





CLAIMANTS' EXHIBIT 3-5

Oct. 10, 1924 --- INTERSECTION OF LEXINGTON AVE. & 42ND ST. LOOKING EAST.

TIME... bet. 11 A.M. & 12:30 P.M

CLAIMANTS' Exhibit S-4

Oct 10 1924 --- Buildings 129-133
131-135 East 124th St. looking
North.

2 Time --- Oct 11 1924 @ 12:30 P.M.

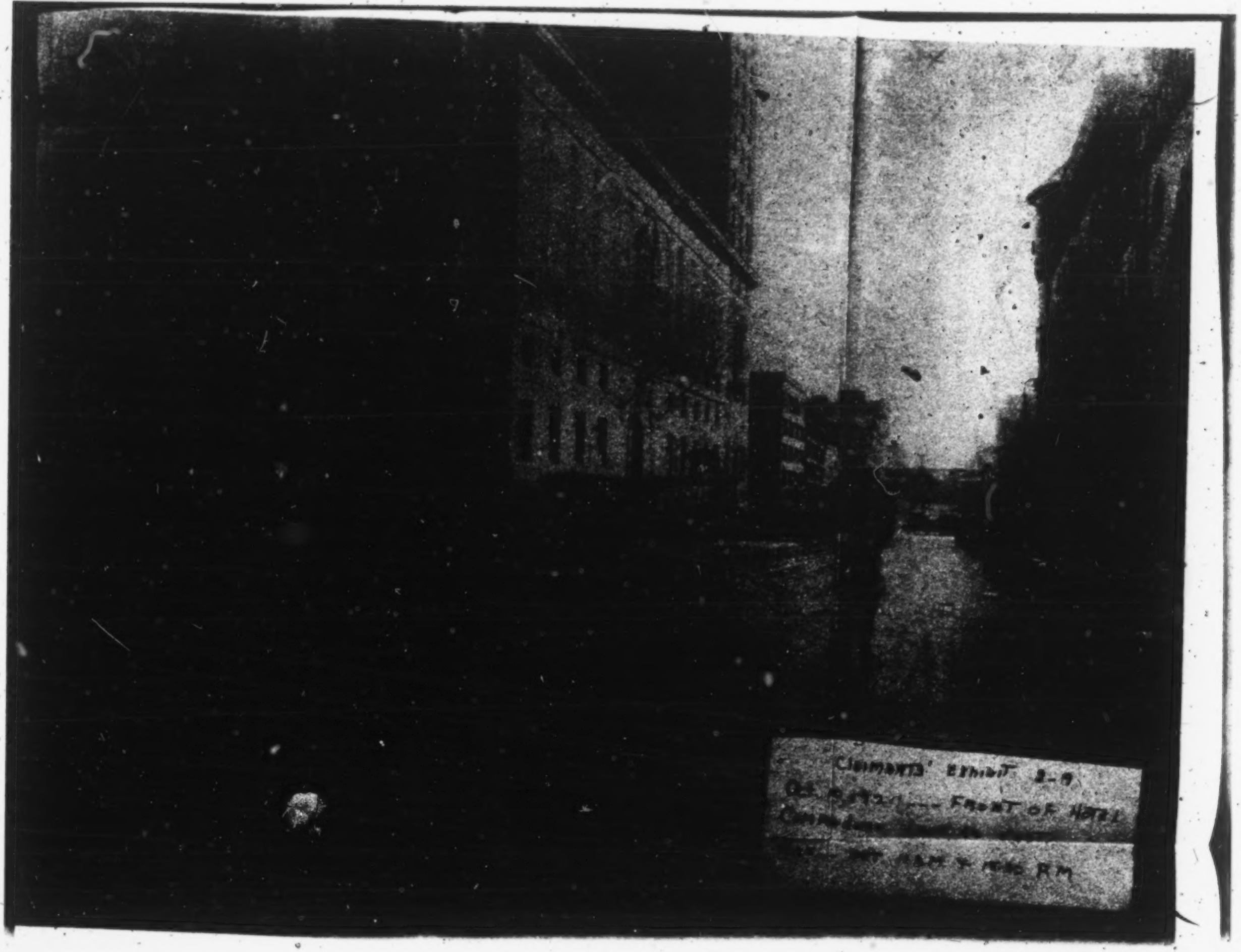
CLAIMANTS EXHIBIT S-7
Oct. 10, 1924 --- 3RD & 42ND Sts
LOOKING EAST.
TIME -- BET. 11 AM & 12:30 P.M.

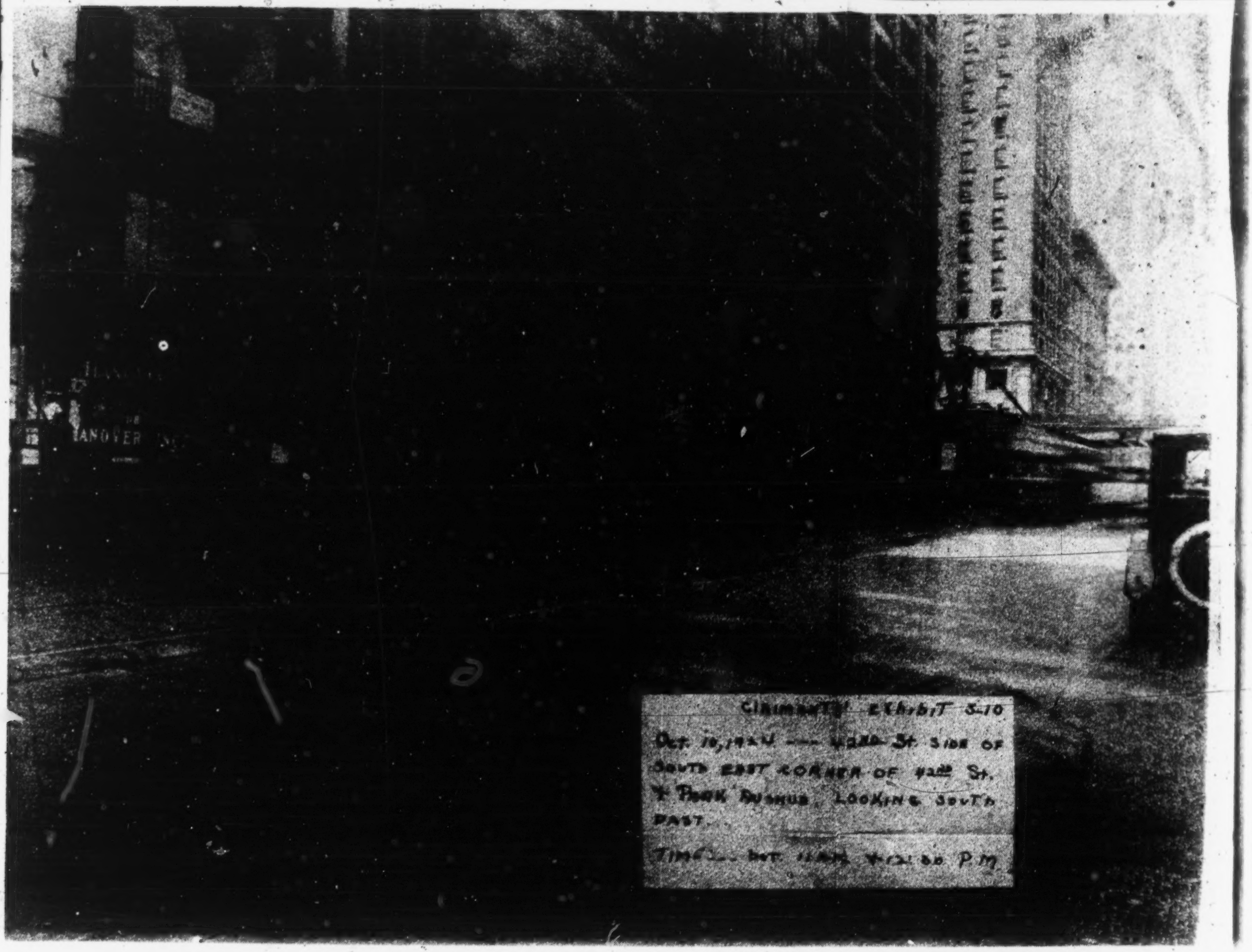
CLAIMANTS' Exhibit 3-B

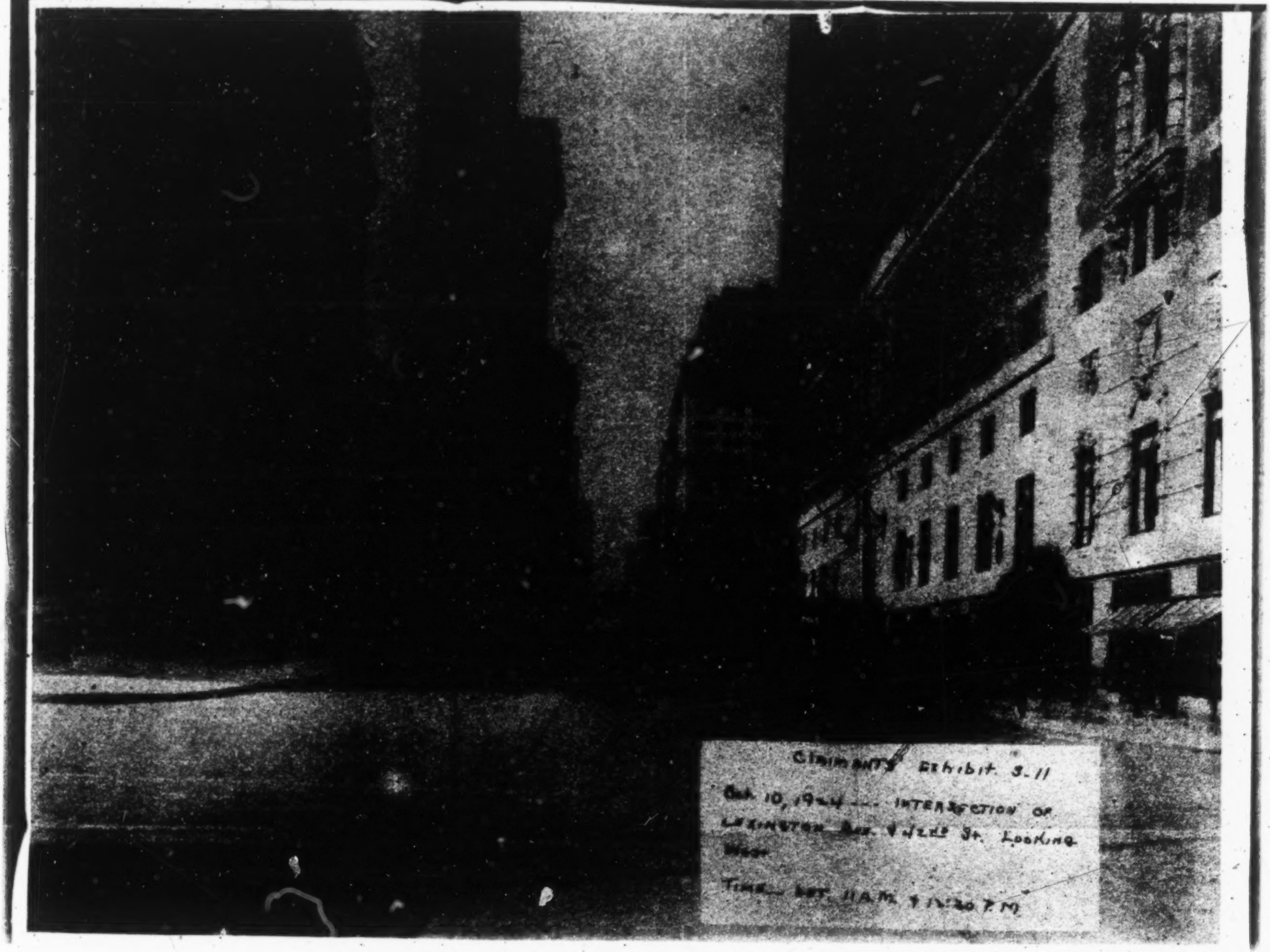
Oct. 10, 1924 --- 42nd St. side of North West corner of 42nd St. & 3rd Ave. Looking North East.

TIME -- bet. 11 A.M. & 12:30 P.M.




CLAIMANTS' EXHIBIT 2-B
FRONT OF HOTEL


CLAIMANT'S EXHIBIT 5-10
Oct. 10, 1924 — 42nd St. side of
South East corner of 42nd St.
& Park Avenue, looking South
East.
Time — bet. 11 A.M. & 12:00 P.M.


Claimant's Exhibit 3-11
Oct. 10, 1924 — INTERSECTION OF
LEXINGTON AVE. & 42ND St. LOOKING
West
TIME — BET. 11 A.M. & 11:30 P.M.

CLAIMANTS' EXHIBIT 3-12.
Oct. 25, 1924 — South side of
#259 St. looking West from
LEXINGTON AVE.


Exhibit 3.14
4320 St



CLAIMANTS' EXHIBIT 3-15
Oct. 24, 1944 - South side of 42nd St looking South East from Levington Ave.

CLAIMANTS' EXHIBIT S-16
Oct. 26, 1924 --- 42nd St.
SIDE OF SOUTH WEST CORNER
OF 42nd St. & 3rd AVENUE.
LOOKING SOUTH.



1932

5794

5795

Claimants' Exhibit "U"—Map Showing Plottage of Property as of December 7, 1923.

5796

Claimant's Exh.-'U'

IN THE MATTER
OF

Application of the City of New York, re... acquiring title to the Elevated Railroad st... tracks, stations, platforms, stairways and ... nances of the MANHATTAN RAILWAY CO... NY, or by whomsoever owned, in East 42nd ... constituting the existing 42nd Street spur ... Borough of Manhattan, City of New York; ... to acquire the right to extinguish all rights ... ments and franchises of every nature what... of said MANHATTAN RAILWAY COMPA... by whomsoever owned, to construct, maint... use said elevated railroad structures, tra... tions, platforms, stairways and appurtenan...

ELEVATED RAILROAD STR...
AND PROPERTY ADJACENT...
AFFECTED BY THESE PROCE...
JUNE 1923

SCALE OF FEET

EAST 43RD ST.

PRUDENCE BUILDING

LIGGETT BUILDING

NATIONAL CITY BUILDING

VANDERBILT AVENUE BUILDING

VANDERBILT AVE.

AVENUE

GRAND CENTRAL TERMI...

EAST 42ND

VIADUCT

DRAFT DISTRICT MAP

Area of Easement

Claimant's Exh. 'U'

IN THE MATTER
OF

Application of the City of New York, relative to acquiring title to the Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances of the MANHATTAN RAILWAY COMPANY, or by whomsoever owned, in East 42nd Street, constituting the existing 42nd Street spur, in the Borough of Manhattan, City of New York; and also to acquire the right to extinguish all rights, easements and franchises of every nature whatsoever of said MANHATTAN RAILWAY COMPANY or, by whomsoever owned, to construct, maintain and use said elevated railroad structures, tracks, stations, platforms, stairways and appurtenances.

TED RAILROAD STRUCTURES
ROPERTY ADJACENT THERETO
FECTED BY THESE PROCEEDINGS
JUNE 1923

SCALE OF FEET
0 10 20 30 40 50 60 70 80 90 100

GRAND CENTRAL TERMINAL

Chas. Stephen Mercer
CIVIL AND CONSULTING ENGINEER
15 PARK ROW, NEW YORK

EAST 43RD STREET DISCONTINUED

(5 Stories)

HOTEL COMMODORE
275'x 208', Area 57,200 square feet
(26 Stories)

(26 Stories)

(26 Stories)

(2 Stories)

Easement Line of Subway as fixed Jan 4 1915

Easement Line of Subway Jan 4 1915

Easement

Area of

DISCONTINUED (June 26 1911)

PLACE

AVENUE

LONG BEACH BUILDING
5 Stories

79

LIMIT OF AREA SHOWN ON

Platform
Platform
Foot Walk
Foot Walk
20 Foot Walk
Curb Line
End of Tiles

STR

DRAFT DAMAGE MAP

VIADUCT

Additional Easement

EAST 43RD STREET

AVENUE

LONG BEACH BUILDING
3 Stories

1 Story
5 Stories
5 Stories
5 Stories
4 Stories
4 Stories
4 Stories
2 Stories
2 Stories
2 Stories
4 Stories
5 Stories
2 Stories
2 Stories
2 Stories

79

Curb Line
Foot Walk
STREET
End of Tiles
Foot Walk
Foot Walk
End of Tiles
Curb Line
Curb Line
Platform
Platform

DRAFT DAMAGE MAP

75

HOTEL
3 Stories
Lobby
1 Story
1 Story
1 Story
1 Story
1 Story
1 Story
5 Stories
5 Stories
6 Stories
HOTEL
3 Stories

AVENUE

NATIONAL CITY BUILDING

AVENUE

PRUDENCE BUILDING

LIGGETT BUILDING

VANDERBILT AVENUE BUILDING

VANDERBILT

EAST

41

MADISON

HOTEL

LINCOLN NATIONAL BANK

LENROY

AND SAFE DEPOSIT CO.

EAST 41 ST

IN THE MATTER
OF

Application of the City of New York, relative to acquiring title to the Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances of the MANHATTAN RAILWAY COMPANY, or by whomsoever owned, in East 42nd Street, constituting the existing 42nd Street spur, in the Borough of Manhattan, City of New York; and also to acquire the right to extinguish all rights, easements and franchises of every nature whatsoever of said MANHATTAN RAILWAY COMPANY or by whomsoever owned, to construct, maintain and use said elevated railroad structures, tracks, stations, platforms, stairways and appurtenances.

ELEVATED RAILROAD STRUCTURES AND PROPERTY ADJACENT THERETO

AFFECTED BY THESE PROCEEDINGS

JUNE 1923

SCALE OF FEET

GRAND CENTRAL TERMINAL

Chas. Sheldon Harrison
Civil and Consulting Engineer
15 Park Row, New York

EAST

DISCONTINUED (June 26, 1911)

(26 Stories)

42ND ST

PARK AVENUE VIADURT

PARK AVENUE

Area of Easement 3515.85 sq ft

Easement Line of Subway fixed in 1900

HOTEL

BELMONT

Platform

Platform

Foot Walk

Curb Line

20 Foot Walk

Additional Easement 670.7 sq ft

Easement Line of Subway Feb 4, 1920

PERSHING SQUARE BUILDING

24 Stories

6 Stories

18204 sq ft

Area of Easement

Easement Line of Subway

125'-6" x 197'-6" Area 24,786.25 sq ft

24 Stories

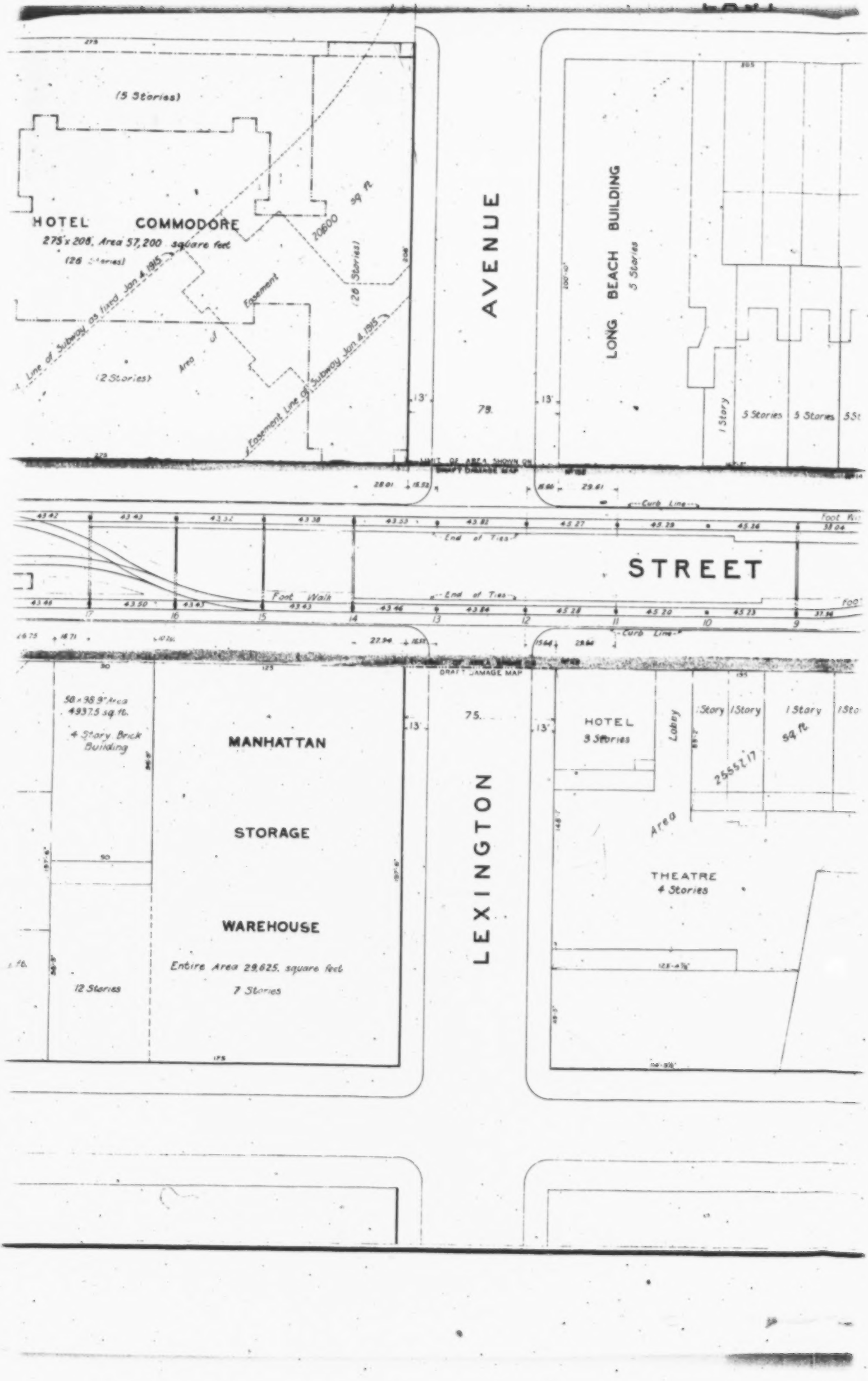
BOWERY SAVINGS BANK

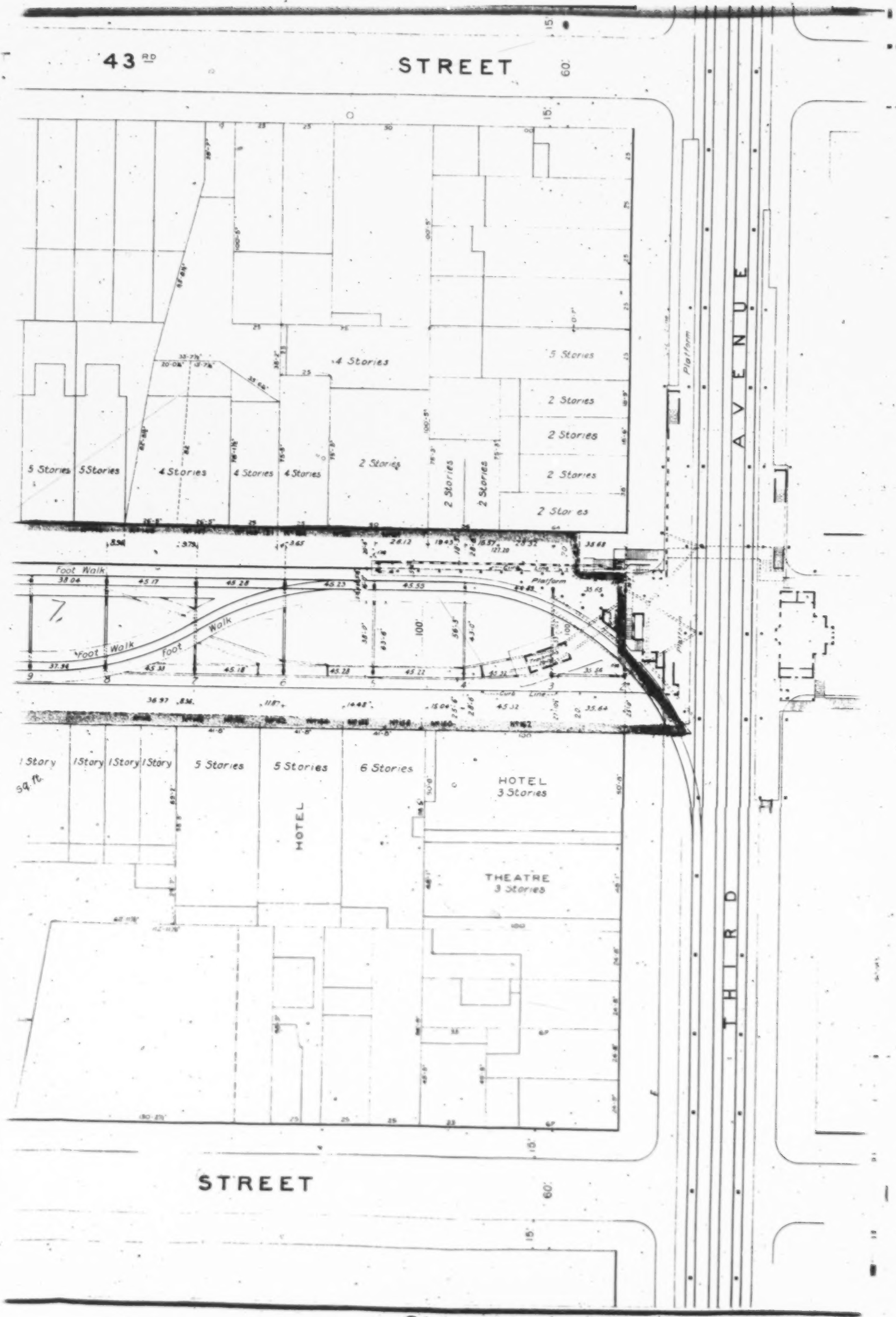
14 Stories

Area of Easement fixed Feb 4, 1920

44.6 sq ft

94'-6" x 197'-6" Area 20,638.75 sq


(5 Stories)
HOTEL COMMODORE
275'x 208', Area 57,200 square feet
(26 Stories)
Line of Subway, as fixed Jan 4 1915
Easement
Area of
(2 Stories)
20600 sq ft
(26 Stories)
Easement Line of Subway Jan 4 1915
AVENUE
79.
13'
LONG BEACH BUILDING
5 Stories
1 Story
5 Stories
5 Stories
5 St
LIMIT OF AREA SHOWN ON
DRAFT DAMAGE MAP
28.01
18.52
29.61
Curb Line
STREET
43.42
43.43
43.32
43.38
43.33
43.82
45.27
45.29
45.34
38.04
End of Tiles
43.49
43.50
43.43
Foot Walk
43.43
43.46
43.84
45.28
45.20
45.23
37.96
17
16
15
14
13
12
11
10
9
16.75
16.71
27.94
18.52
15.66
28.84
Curb Line
DRAFT DAMAGE MAP
50 x 98.9' Area
4937.5 sq ft.
4 Story Brick
Building
MANHATTAN
STORAGE
WAREHOUSE
Entire Area 29,625. square feet
7 Stories
12 Stories
75.
LEXINGTON
HOTEL
9 Stories
Lobby
1 Story
1 Story
1 Story
25552.17 sq ft
Area
THEATRE
4 Stories



CLAIMANT'S EXH. 'U'.

Opinion of O'Malley, J.

5797

Supreme Court, New York County, Extraordinary Special Term.

In the matter of the application of the City of New York, relative to acquiring title to the elevated railroad structures, tracks, stations, platforms, stairways and appurtenances of the Manhattan Railway Company, or by whomsoever owned, in East Forty-second street, constituting the existing Forty-second street spur, in the Borough of Manhattan, City of New York, and also to acquire the right to extinguish all rights, easements and franchises of every nature whatsoever of said Manhattan Railway Company, or by whomsoever owned, to construct, maintain and use said elevated railroad structures, tracks, stations, platforms, stairways and appurtenances.

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Proceedings by the City of New York to acquire title to certain elevated railroad property in East Forty-second street, Borough of Manhattan, City of New York.

George P. Nicholson, corporation counsel (L. Howell LaMotte, assistant corporation counsel) for City of New York; James L. Quackenbush (J. Osgood Nichols of counsel) for Interborough Rapid Transit Company; Murray, Aldrich & Roberts (William Roberts and William Dean Embree of counsel) for Manhattan Railway Company; George Welwood Murray for the Equitable Trust Co. of New York; Davies, Auerbach & Cornell (Edward Cornell and Brainard Tolles of counsel) for Central Union Trust Co.; William H. Page for the 42d St. Association, as *Amicus Curiae*.

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James O'Malley, J.—This is a condemnation proceeding instituted by the City of New York to

5800 acquire title to the property of the Manhattan Railway Company within the lines of East Forty-second street, between Park and Third avenues. The property involved, briefly described, is the so-called "East Forty-second Street Elevated Spur," hereinafter referred to as the spur. Four claimants have appeared, namely, the Manhattan Railway Company, owner; the Interborough Rapid Transit Company, lessee, and the Central Union Trust Company of New York and the Equitable Trust Company of New York, holders and trustees
5801 of the first and second mortgages, respectively, of the Manhattan Railway Company. By consent of claimants, however, but one award is required, the amount of which is to be apportioned among them by agreement.

In addition it is to be noted that there also appeared in the proceeding the Forty-second Street Association, composed of various abutting property owners, through their counsel as *amicus curiae*.

At the outset it is to be observed that among the numerous questions of law involved one is wholly
5802 novel and of unusual interest and importance to the claimants and the city. It relates to the nature and character of the claimants' interest in certain street easements, particularly the so-called private easements of light, air and access, as distinguished from claimants' public easements in the street, and their value, if any, to the railroad. This legal phase has never before been presented, at least in a condemnation proceeding, and as both parties agree that it is within the bounds of possibility that eventually all elevated lines in the city may have to be taken in condemnation, this proceeding obviously may become the forerunner of

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numerous cases. Indeed, another similar proceeding for the condemnation of the Sixth avenue elevated structure between Fifty-third and Fifty-ninth streets has already been instituted and the trial thereof formally begun before me. It has been adjourned, however, until a decision by the court of last resort can be had herein. It is obvious, therefore, that the ultimate decision herein must establish a rule for the future guidance of the parties in interest.

In the trial of the case the aim has been to permit a broad latitude in the introduction of evi- 5804
dence, in order that the higher courts may have before them all relevant facts upon which to base a decision in the event that an erroneous rule of damage is here adopted.

Unlike the ordinary condemnation, this proceeding is based upon special legislative acts, both state and municipal. The basic statute was enacted by chapter 788 of the Laws of 1917. It vested the Public Service Commission with power to "authorize the removal by Manhattan Railway Company of the existing tracks, structure, station and appurtenances on its railroad on East Forty-second 5805
Street, in the Borough of Manhattan, in the City of New York, without prejudice to any franchise of said company to construct, maintain or operate the same, or the right or obligation of said company to *restore* the same in case such restoration shall be deemed to be necessary or convenient for the public service." (Italics mine.) Such authority was to be by certificate granted to the railway company with the approval of the board of estimate and apportionment and to be *"accepted"* by the railway company. In addition the certificate was to provide the terms and conditions for the

5806 removal or restoration and the cost thereof. Owing to the opposition of the railway company to the removal of the spur, however, nothing was accomplished under this permissive statute as originally enacted.

The powers of the Public Service Commission with respect to the subject-matter of the original act were considerably extended by the amendment of 1919 (chap. 611, Laws of 1919). This amendment sought to remedy the defects in the original act by substituting a mandatory in place
5807 of a mere permissive remedy. It vested the commission with power to determine whether the maintenance of the spur was necessary and convenient for the public service, or if necessary and convenient, whether it constituted an obstruction or an impediment to the public use of the street. Such investigation by the commission was to be instituted upon the request of the board of estimate and apportionment, in the event that the certificate required under the original act had not been made, or no agreement with the railway company had been reached by October 1, 1919.

5808 Following the enactment of the amendment and pursuant to a resolution of the board of estimate and apportionment, the commission held hearings and determined (1) that the spur was no longer necessary or convenient for the public service, and (2) that it constituted an impediment and obstruction to the public use of the street, and subsequently issued its certificate to this effect as required by the amendment of 1919. The pertinent provisions of the amendment with respect to said certificate and its effect, and the authority of the board of estimate and apportionment thereunder are as follows: "Upon making of such certificate

by said commission the said city shall have the right to condemn and remove from the street such tracks, structure, station and appurtenances or such unit or portion thereof as may have been determined by said commission to be no longer necessary and convenient to the public service or an impediment or obstruction to the public use of the street. Whenever the said board of estimate and apportionment determine it to be necessary or advisable to remove from the street such tracks, structure, station and appurtenances or such unit or portion thereof as shall have been determined by said commission, the said city shall also condemn the rights, easements and franchises of the said Manhattan Railway Company to construct, maintain, operate or use said tracks, structure, station and appurtenances or any unit or portion thereof."

There was further provision for conducting the proceeding for condemnation, in accordance with the usual provisions of the Greater New York Charter relating to condemnation.

On September 30, 1921, the board of estimate and apportionment, in pursuance of the aforesaid acts of the Legislature and of the Greater New York Charter, as amended, adopted a resolution declaring that it deemed it necessary for the public interest to condemn and remove the tracks, structures, station and appurtenances and to condemn the rights, easements and franchises of the Manhattan Railway Company to construct, maintain, operate or use said tracks, structures, station and appurtenances, and that the compensation to be made should be ascertained and determined by the Supreme Court without a jury, and requested the corporation counsel to apply to the

Supreme Court to have said compensation so ascertained and determined and to have the court assess the costs and expense upon the real property within the area of assessment determined by the board of estimate and apportionment to be benefitted by the improvement.

Thereafter, by chapter 635 of the Laws of 1923, a further amendment to the act was passed. It contained a technical description by metes and bounds of the area of condemnation, the structures and various classes and species of property
5813 therein contained, and which were sought to be condemned, and contained the following provisions: "* * * but nothing in this act contained shall be deemed to extinguish or impair any existing franchise rights of the Manhattan Railway Company to construct and maintain a circuit breaker and such facilities, including stairways in connection with and immediately adjacent to its Third avenue station at Forty-second street, as the transit commission may determine to be necessary for the public convenience and necessity. * * * The provisions of this section of this act
5814 shall apply to any proceeding to acquire title heretofore authorized pursuant to the provisions of the acts hereby amended, and all proceedings heretofore had in relation thereto are hereby ratified and confirmed as legal under and pursuant to this act as hereby amended."

The act also made the usual provision for assessing "all or any part of the cost, expense, compensation and damages incurred for and the amount thereof upon real property benefited as a result thereof," and vested the board of estimate and apportionment with power to fix the area of assessment. This area has been fixed and extends from

Thirty-fourth street to Fiftieth street and from Second avenue to Fifth avenue. 5815

After amending its resolution of September 30, 1921, above referred to, so as to conform it to the Act of the Legislature as finally amended, application for an order to have compensation ascertained and the cost of the improvement assessed in accordance with the provisions of the aforesaid acts and the resolution of the board of estimate and apportionment was made, and the order of condemnation was granted July 18, 1923. While the application was opposed by the railway company 5816 only one ground of objection urged need be stated here. It was contended that before the order sought could be made, it was necessary for the transit commission (successor to the public service commission) to first determine the character of the facilities, including stairways, in connection with its Third Avenue station at East Forty-second street, made necessary by the removal of the spur. This objection with all others was overruled at Special Term and later at the Appellate Division (208 App. Div. 794). The railway company thereafter having applied to the transit commission for 5817 a determination pursuant to the provisions of chapter 635 of the Laws of 1923 (*supra*), as to what facilities at the point in question were required for the public convenience and necessity after the removal of the structure, that body instituted proceedings and conducted hearings for the making of such determination.

The transit commission ordered and determined as follows:

(1) That the commission issue a certificate of convenience and necessity pursuant to chapter 635

of the Laws of 1923, and that the petitioner maintain, construct or reconstruct and operate

(a) Two columns supporting the Forty-second street station of the Third Avenue Elevated Line, which columns are now within the roadway at Forty-second street west of Third avenue, and a plate girder in place of the present lattice type construction extending from the northerly curb to the southerly curb of Forty-second street.

(b) A stairway at the southwesterly corner of
5819 Forty-second street and Third avenue leading from the street to said elevated railroad structure.

(c) A stairway at the northwesterly corner of Forty-second street and Third avenue leading from the street to said elevated structure.

(d) The waiting room, house for trackmen, porter's closet, women's toilet, a circuit breaker house and cable splicing platform now upon the structure of the said elevated railroad.

(e) A duct line under and along Forty-second street from shaft No. 1 of the Queensboro Subway
5820 Rapid Transit Railroad to a pipe connection on a column supporting the elevated railroad at Forty-second street and Third avenue sufficient to accommodate all cables now carried on the spur.

After this work was completed and on September 22, 1925, proof of the cost thereof was submitted and on the hearings herein finally determined. Before the removal of the elevated structure the property involved had been viewed by the court in the presence of counsel, as required by law.

Three general determinations are now required to be made herein:

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First. The nature and extent of the property of the railroad company in East Forty-second street within the area of condemnation and taken in this proceeding.

Second. The fair market value of such property on the date that title thereto vested in the City of New York, to wit, December 7, 1923.

Third. The cost of the improvements at Forty-second street and Third avenue determined by the transit commission to be convenient and necessary after the acquisition and removal of the elevated structure.

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The first and second propositions present the most serious problems. Under the first, three elements are involved, namely, (a) the franchise, (b) certain street easements, both private and public, the railway company claims to own, and (c) its structure. There is no dispute as to the existence of (a) and (c). Respecting (b) there is most serious difference as to existence. Respecting the second general proposition, involving value, there is as to all three elements of property rights sharp dispute. The third presents less serious difficulty.

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These questions will be considered in the order given in so far as practicable, and the contentions of the parties respecting each question briefly stated. In this order the first question to be considered is the franchise, its nature and extent as property, and its value here, if any.

Concededly the franchise, both from the state and city, had its source in the Rapid Transit Act (chap. 606, Laws of 1875). This authorized the mayors of the cities of the state upon application of fifty reputable taxpayers to appoint a commission to determine upon the necessity for the con-

struction of steam railways and routes and plans therefor. The transit commission appointed by the Mayor of New York City selected the routes and decided upon the plan for the construction of the railroad. One of the routes selected included this spur as part of the Third avenue route.

The route selected and the plan of construction adopted by the commission thus appointed was finally adopted by the common council and was approved by the mayor September 7, 1875. This final action pursuant to the act of the Legislature
5825 constituted the company's franchise. The act itself was held constitutional and the validity of the franchise sustained (Matter of New York. Elevated RR., 70 N. Y. 327), and the grant thereby made was later construed like any other grant, as having been "made by the state upon consideration" (Mayor *v.* Manhattan R'y., 143 N. Y. 1, 31, 32).

The nature of the right thus acquired by the railway company is to be determined by the power conferred upon the city by the Rapid Transit Act and by subsequent acts of the city taken in pursuance of the power thus conferred. Concededly
5826 the franchise thus given by the state and city was to construct and operate an elevated railway in accordance with definite plans adopted by the city, and the rights obtained by the railway company were only such as were authorized by the Act of 1875 (Syracuse Water Co. *v.* City, 116 N. Y. 167). The railway thereby became "vested with an interest in the street in perpetuity" for the purposes of an elevated railroad (People *v.* O'Brien, 111 N. Y. 1, 38; White *v.* Manhattan R'y., 139 N. Y. 19; Milhau *v.* Sharp, 27 N. Y. 611), and "the abutting rights came within the boundaries of the grant, and if the city had owned the easements they

would have passed to the railroad companies by virtue thereof" (Hindley *v.* Manhattan R'y., 185 N. Y. 335, 355). 5827

Such an easement was a right in the street, with the character of property transferable as such, independent of the life of the corporation (People *v.* O'Brien, *supra*). It was "an interest in and to a certain extent a title in the street for the purpose of the construction and operation of its railroad, which was in the nature of property and which was sufficient to enable it to treat with abutting property owners in the character of one who had 5828
an interest in the servient estate" (White *v.* Manhattan R'y., *supra*, p. 26).

It has been held that such a franchise constitutes a grant of an easement in the street (People, *ex rel.* Dunkirk & F. R. Co. *v.* Cassity, 46 N. Y. 46, 49; N. Y. Telephone Co. *v.* State, 169 App. Div. 310, 316), and in Consolidated Gas Company of Baltimore *v.* Mayor (101 Maryland, 541, 546, 547), where distinction between a franchise and an easement is drawn, it was held that the latter is property to be considered separate and distinct from the former and to be valued as such. In the latter 5829
case the easement had been, for the purpose of taxation, separately considered and valued. It was said: "It will be found upon examining some of the cases that where there is occasionally in the arguments of counsel a want of exactness in the use of terms, and now and then the *right* to do a particular thing which *is* the franchise is confused with the *results* achieved in the exercise of the right, and those *results* are inaccurately spoken of as the franchise. The *right* to occupy the streets with gas mains is a *franchise*—the actual *occupation* of them in that way pursuant to the franchise

is the acquisition of an *easement*. You must distinguish between the *right* to do the thing and the *interest* acquired in the soil by the exercise of that right. The right of a railroad company to be and to build a road is a franchise from the state; the roadbed acquired by purchase or condemnation is an easement altogether distinct therefrom, though obtained as a result of the exercise of that pre-existing franchise. * * * The distinction is clear between a franchise as such and the property acquired for the use of the fran-
5831 chise. The naked, unused, slumbering franchise is property, but it is property concerning the assessment of which in *that condition* for the purposes of taxation the statutes do not make provision otherwise than by including it as an element which enhances the value of the shares of the capital stock. But when the franchise is brought into activity and is availed of to accomplish the ends it was designed to effect the property acquired under it becomes amenable to the tax laws apart from the tax on the stock and its value as an easement, if an easement it be, may
5832 be largely augmented by the use to which the franchise enables that property or easement to be put."

Claimants urge that under these authorities the railway has, in addition to the private easements of light, air and access, secured from the abutting owners a public easement in the street in addition to the mere right of operation given by its franchise; that this additional right is property, and consists of the space in the street occupied by the columns and the structure as a whole, and of the street rights of occupation and control; that this right to occupy and use such space is to be con-

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sidered in connection with the franchise in determining its value.

The claimants urge further that this space so occupied, the right to which has been granted in perpetuity, is to be measured by its available use, not to the railroad, however, but for any purpose to which it may be applied, and that as the city will adapt it to street uses, thereby relieving the enormously congested traffic conditions in the locality of Forty-second street, it should pay therefor such compensation as the space in question is worth for such purposes; that such space is to be valued upon the basis of charges made by the city to private owners for the occupation of space by overhead structures of any character, such as covered or open platforms connecting buildings, street viaducts and structures of such character. On the basis of such charges claimant's evidence tended to show that this right is worth approximately $300,000.

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Assuming the existence of such an easement, I am inclined to the view that for the purposes of valuation herein the franchise and right of occupation of the street are so inseparable in their nature that they must be considered as a single entity (People, *ex rel.* Met. St. R'y. Co. *v.* Tax Comms., 174 N. Y. 417, 440, 441). The franchise here granted was for one purpose and one only, namely, for the maintenance and operation of the railroad. The company secured no further rights in the bed of the street. It could erect no other structure therein. It had no right to erect a building in which to store its trains, for example, nor could it use the tracks on its structure for storage purposes alone. Its rights in the street, whatever they are, were strictly limited by its franchise.

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from the state and city, namely, to maintain and operate an elevated railroad. And this it was required to maintain and operate so long as it held its franchise. Otherwise it would be required to forfeit the same.

My conclusion is, therefore, that while this public easement spoken of is to be considered as one of the elements of value of the franchise it cannot be assigned a value separate and distinct therefrom, and that the value of the franchise must be finally determined upon the basis of the present,

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and prospective earning power of the spur, not, however, considered in isolation, but as a part of the entire Third avenue elevated system.

Before considering the evidence relating to the valuation of the franchise a brief description of the property within the area of condemnation should be given. The spur in question is approximately 900 feet in length, extending from the Grand Central station at Park avenue to the Third avenue station. It was constructed in 1878 as part of the present Third avenue elevated lines. During that year, and prior to the extension of the

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railroad on Third avenue above Forty-second street, trains ran direct from Chatham square to the Grand Central station. For a short time after the extension of the railroad above Forty-second street trains were still operated direct to the Grand Central station as well as above Forty-second street. Owing, however, to a serious wreck resulting from the collision of two trains at the crossover at Third avenue, it was decided to discontinue the operation of through trains to the Grand Central, and since early in 1879 a shuttle service has been maintained between the Third avenue station and the spur station at Park avenue.

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The service at the time title vested consisted of two trains, having one or two cars, depending upon the character of the traffic. These trains were operated simultaneously, it being necessary for each to leave the station where it had taken on passengers before the other could pull into such station. Both uptown and downtown passengers on the Third avenue trains transferred to the spur without additional charge, and similarly, passengers who boarded the shuttle train at Park avenue transferred free at Third avenue to uptown and downtown trains. Downtown passengers were 5840
able to transfer to the shuttle train from the same platform upon which they left the Third avenue train, but uptown passengers and passengers transferring to the shuttle train going uptown or downtown were required to use the crossover, by descending stairs to a platform under the tracks and ascending stairs leading to the uptown platform. In consequence the records show that there were many more westbound passengers using the shuttle service than eastbound, due, no doubt, to the more convenient facilities for the use of the platform by the former. In the early history of the spur's 5841
operation, and before any subways were built, it was a far more important and valuable adjunct to the Third avenue system than subsequently. Still the claimants contend that it was, at the date title vested in the city, capable of profitable operation. The city, on the other hand, contends that its continued operation was a financial detriment to the claimants, rather than a benefit, and that the railroad has profited by its removal.

In support of their claim that the spur was operated profitably and not at a loss the claimants introduced in evidence several charts tending

5842 to show the trend of traffic in rapid transit during a period extending back to 1890. These charts were based upon the number of ticket sales or passengers carried. A record of each had been maintained by the railroad and furnished to the Public Service Commission and its successors, the Transit Commission, since the establishment of that body. They tend to show that between the years of 1890 and 1900, during which period the surface roads were being electrified, there was little or no increase on the elevated lines; that be-

5843 tween the latter date and the opening of the West Side subway in 1904, during which time the elevated lines were being electrified, the trend was upward; that following the opening of the West Side subway in 1904 there was a sharp falling off in the traffic on the Manhattan Elevated lines; that in 1907 it began to recover and to increase, and finally reached its peak in 1917, prior to the opening of the East Side subway, during which time there had been added to the elevated lines the so-called third track; that following the opening of the East Side subway in 1917 there was again

5844 a falling off in traffic, particularly on the Third avenue elevated line, with which the subway was brought into direct competition; that this condition obtained until the twelve months' period ending June 30, 1922, when the upward trend on the elevated lines again set in, due, it is claimed, to the fact that the East Side subway, particularly at the Grand Central station, had reached the point of saturation, at which time the elevated line began to benefit by the overflow traffic.

With respect to the traffic at the spur station at Park avenue during this period from 1890 it appears that there was an increase from 1,413,000

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in 1900 to 2,273,000 in 1904; from then until 1906 there was a drop to 996,300; from 1907 to 1913 there was little change; from 1913 to 1918 there was an increase to 1,862,464, and from that year to 1922 a decrease to 1,390,000. For the same period of years at the Third avenue station at Forty-second street there was an increase between 1900 and 1904 from 1,244,000 to 2,225,000; a drop in 1905 to 2,086,000; but slight variation from then to 1916, when it began to increase, and so continued, with few exceptions, until 1921, when it reached 3,612,000. After a decrease in 1922 it rose to 3,683,000 in 1923.

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The evidence further tends to show that the combined traffic at the spur and Third avenue stations increased from 2,657,000 in 1900 to a peak in 1904 of 4,499,000. This was followed by an abrupt drop to approximately 3,000,000 in 1907, and was due generally, if not almost entirely, to a loss on the spur; thereafter, and with some fluctuation, there was an increase to 4,634,000 in 1907 and a final increase to 5,082,000 in 1921. There was a decrease in 1922 to 4,732,000, but in 1923 an increase to approximately 5,000,000.

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This evidence further tends to show that the upward trend had begun to manifest itself at the two stations in question in 1921; that at the spur station the sales increased from 1,290,100 for the 12 months ending June 30, 1922, to 1,358,383 for the 12 months ending June 30, 1923, and to 1,439,524 for the 12 months ending November 30, 1923, as compared with 1,293,880 for the 12 months ending November 30, 1922; that at the Third avenue station the sales increased from 3,441,700 for the 12 months ending June 30, 1922, to 3,683,883 for the 12 months ending June 30, 1923, and to

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3,928,690 for the 12 months ending November 30, 1923, as compared with 3,483,600 for the 12 months ending November 30, 1922.

Following the discontinuance of the spur on December 7, 1923, there were, of course, no further ticket sales at the spur station at Park avenue. Concededly the sales at the Third avenue station immediately increased, and the sales there slightly exceeded the prior combined sales of the two stations. But it is contended by the claimants that based on the normal upward trend as disclosed

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in the sales of tickets at each of the two stations for the eighteen months immediately preceding the cessation of the spur, considered in connection with a corresponding upward trend of sales at the Second, Sixth and Ninth avenue stations at Forty-second street, and at the Second, Sixth and Ninth avenue stations at Thirty-fourth street during the same period, the combined sales of the two stations, if the spur had continued in operation, would have been far in excess of the sales at Third avenue after December 7, 1923. Thus it is claimed that for the year ending June 30, 1924, there was

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a reasonably estimated loss of 778,400 ticket sales resulting from the abolition of the spur.

Based upon a five-cent fare, the estimated loss for the five years in question would exceed $100,000 the first year and a proportionate increase upon the figures given for the subsequent years. After deducting the annual cost of operation, which was conceded to be the sum of $41,230, these figures would tend to show a substantial loss to the railroad.

The evidence also tended to show that the subway stations at the Grand Central and at Times Square on December 7, 1923, had practically

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reached the point of saturation, and that while the traffic at each of these points tended to show some increase, such increase was relatively less during the two years preceding December, 1923, than the increase on the elevated lines along Forty-second street and other points in the immediate vicinity.

The petitioner relied chiefly upon the testimony of Dr. John Bauer to support its contention that the spur not only was not a source of revenue and benefit to the claimants, but an unprofitable part of the elevated system and a burden. He had been instructor and assistant professor of economics 5852
and finance in Cornell University from 1908 to 1914. He had given particular attention to public utility regulation and finance, including railroad transportation, finance and organization. From 1914 to 1916 he was statistician to the Public Service Commission of this state in the First District, during which time he made an extensive survey of street railways respecting their franchises, financial history and operating conditions. From October, 1916, to June, 1917, he was at Princeton University in charge of the courses of accounting, corporation finance and public utility regulation 5853
and finance. During this time he also reported to the Public Service Commission with respect to operations under certain contracts with the City of New York of both the Brooklyn Rapid Transit system and the Interborough Rapid Transit Company. Between June, 1917, and November, 1919, he was chief of the accounting division of the Public Service Commission in the First District. In connection with his work with the Public Service Commission he had become acquainted with and had covered most of the phases of the existence and operation of the Manhattan Railway

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Company, and had made a special study of the spur in connection with the commission's hearing as to its being necessary and convenient to the public service, and whether or not the physical property was an impediment or obstruction to the public use of Forty-second street.

His analyses and conclusions were based upon this experience, the statistics and evidence of claimants, and further statistics furnished him. Broadly taken, his line of reasoning was in the following manner, taking into consideration the

5855 years of 1919-1923, inclusive.

By test it had been found that the normal number of eastbound passengers using the spur exceeded the ticket sales at the spur station by 6.5 per cent. The ticket sales, exclusive of turnstile readings, were increased by that proportion, thus arriving at the number of eastbound passengers. By actual count on two days in November, 1923, it was found that westbound passengers exceeded the number of eastbound passengers by about 58 per cent. The witness adopted, to the benefit of the spur, this percentage as 60 per cent. and so reached

5856 figures for westbound traffic during the period in question. Multiplying the combined totals by $.05 he obtained a result representing the gross revenue from traffic. By a card inquiry on a single day in November, 1923, in which 4,828 cards were returned out of 7,700 distributed, it was computed that out of the total distance traveled 3.1 per cent. was on the spur. Dr. Bauer, for the purposes of his computation, took it as 5 per cent. and allocated that portion of the gross revenue from the traffic to the spur. To obtain the total revenue to be allocated to the spur he added to the last figure an average of .11 per cent. of the mis-

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cellaneous revenue, apart from traffic revenue, of the entire system. This last percentage was obtained by determining the percentage of car miles on the spur as compared with the car miles on the entire system.

To compute for the respective years the operating cost of the spur he made what he considered a reasonable allocation to the spur of the operating expenses and taxes of the entire system and added thereto his estimate of the cost of operation of the cars on the spur and of the platforms with respect to labor. Operating expenses were 5858
allocated as follows: The witness took the total cost per car mile on the entire system for maintenance of way and structure, maintenance of equipment, miscellaneous and taxes, and multiplied the result by the number of car miles on the spur, assuming that the cost on the spur would equal, if it did not exceed, that on the rest of the system. The cost of operation of cars, including platform expenses, on the spur was specifically presented for the computation in detailed form for 1923 only, but the witness was of the opinion that they were as large at least for the preceding 5859
years in question, and for those years be attributed the same total.

From the foregoing it was apparent that on the city's theory the spur was during the period in question operated at a distinct loss. A recapitulation of his figures follows: The first column shows gross revenue, the second expense and the third excess of expense over revenue for the spur during the respective fiscal years:

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1923	$11,042.48	$35,860.40	$23,017.92
1922	10,408.21	35,280.39	24,872.18
1921	11,553.63	35,813.99	24,260.36
1920	11,990.87	36,122.66	24,131.79
1919	12,908:70	36,459.05	23,550.35

This witness stated that economists would compute the value of the properties of a railroad and of most industrial properties on the basis of its earning power. They would estimate or determine the annual future net earnings and capitalize these amounts or discount them at the market
5861 rate of interest or discount. Under this method thus applied the spur franchise, of course, had no value whatever.

The witness also considered the possible future or potential value of the spur. He made his deductions from the so-called trend of traffic, the theory adopted by claimants, as indicated by ticket sales at subway and elevated stations in the immediate neighborhood. His chart, based upon fiscal years, showed for the period they were in existence the ticket sales between 1900 and 1923 of the following stations: The spur, the Third and
5862 Sixth Avenue Elevated Lines, the Times Square Subway Stations of the Interborough Rapid Transit and Brooklyn-Manhattan Transit, and the Grand Central Subway Station, all on Forty-second street. Summarized, it showed the following indicated gains and losses, the first figures from left to right being those of the spur and the second of all stations:

1900–1923	04.3%	1594.6%
1900–1905	11.2%	175.6%
1905–1910	30.2%	103.6%
1910–1915	11.3%	29.2%
1915–1920	12.2%	86.1%
1918–1923	37.1%	74.1%

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There is further evidence in the record which tends to show the ticket sales for the fiscal and calendar years, for monthly, yearly and longer periods, of other stations such as Thirty-fourth and Forty-seventh streets, on Third avenue, and Thirty-fourth, Forty-second and Fiftieth streets, on Second avenue, from which various deductions are attempted to be drawn by both sides, but which are too voluminous and of two complex a nature to justify a full recital here.

Suffice it to say that after a full consideration of the evidence thus referred to, and of all of the 5864
evidence in the case, and after viewing the structure in the course of its operation, I am of the opinion that the claimants have failed to sustain the burden of establishing that the spur, at the time title vested, when considered by itself, was profitably operated. The upward trend of traffic which is claimed to have set in about 1922, assuming its existence to have been established, covers so comparatively short a period that it affords an unsatisfactory basis for the conclusion that it was at all permanent in character, or of such a nature as to show that the spur, considered by itself, 5865
would ultimately be operated upon a paying basis. Concededly, the upward trend was due, in part at least, to the installation of the turnstiles in April, 1923. Moreover, it is to be borne in mind that the former traffic of the spur has not all been lost to the Third avenue system. On the contrary, the evidence tends to establish that a great part thereof still reaches the Third avenue line by means of the station at Third avenue and Forty-second street. In fact, since the removal of the spur the ticket sales at this station considerably exceed the combined sales at this station and the

5866 spur station at Forty-second street. While this increase is in part due no doubt to the increased station facilities at the former, concededly a large number of passengers who formerly boarded the spur at the Park avenue end still continue to take the Third avenue system at the Third Avenue Station. But assuming that the combined traffic of the spur, if still operated, and the Third avenue station would exceed that at the latter station at the present time, such loss, when the cost of the continued operation of the spur is taken into ac-
5867 count, seems to me to be of slight consequence.

But the fact that the spur probably was operated without profit is not conclusive on value. It was an integral part of an elevated railroad system which is shown upon the evidence to be operated on a paying basis. This system is composed of various parts, many of which, if considered separately, might show unprofitable operation. Upon the basis of earning power adopted by the city no doubt it would be possible to show that various portions of the claimants' system, such as specified stations or particular portions of trackage between
5868 stations, are operated at a loss. Clearly this should not be adopted as an absolute or final test. Steam railroads, no doubt, have many spurs and switches which may be maintained and operated at a loss to the companies, yet their maintenance and operation may promote the maintenance and operation of the complete railroad system, and thus lend some value to their franchises. If the spur has any value as a feeder to the main system, either present or potential, the defendant is entitled to compensation therefor. Not only its present earning power, but its prospective values must be con-

sidered (S. W. Tel. Co. *v.* Pub. Serv. Comm'n, 262 U. S. 276, 288).

As already appears, it is contended by claimants that the Forty-second street subway station at the Grand Central has reached, or soon will reach, the point of saturation, and that by reason thereof the spur, if it had continued in existence, would have derived the benefit of this overflow. The extent of this overflow, or what part thereof the Third Avenue Elevated would lose by the elimination of its Park avenue station, especially in view of the fact that the public still has an available station at 5870
Forty-second street and Third avenue, with its improved facilities, may be difficult of ascertainment. However, it is a fact which should and must be considered.

Much is made by the city and the attorney for the property owners of the fact that the Manhattan Elevated Railway Company's lines are being operated under a long-term lease by the Interborough Rapid Transit Company and of the practical result of the joint ownership and control of the two systems by the claimants. It is urged, therefore, that in reality the Manhattan Elevated Railway will 5871
sustain no loss, because traffic diverted from its lines is now using the subway. On the other hand, it is urged on behalf of the Manhattan Company that there is always a possibility that the Interborough may forfeit its lease, with the result that the Third avenue elevated system and all other elevated lines will be thrown back upon its hands for future operation. In such event it is urged that the two systems would again be thrown into competition, and therefore the spur in such a contingency would be of great value to the Manhattan Company. Certainly it is not beyond the range of

5872 possibility that such a result may obtain, and it is a consideration the court must take cognizance of in determining the question of value. Moreover, it is to be borne in mind that the income of the spur at and prior to the time title vested was based upon a five-cent fare. The claimant, unlike the Interborough, is not limited to this minimum charge, and in the event of a reverter to the Manhattan Company a higher fare might be charged. This might well result in a profitable operation even upon the city's theory of value. While these
5873 considerations just adverted to may be somewhat speculative in character, they may be generally considered (Brooks-Scanlon Corp'n *v.* United States, 265 U. S. 106, 125, 126). In the case cited the possibility that through governmental action a contract might be rendered impossible of performance was held to be a proper element on damage at the date of taking.

All things considered, I am of the opinion that the franchise has some value. The amount, of course, is difficult of ascertainment, but this fact in itself should not prevent an award if it may
5874 fairly be said that the evidence establishes a value therein. I am of opinion that it has some value, the reasons for which and the amount thereof will be hereinafter stated.

The next question to consider is the so-called private easements of light, air and access. Their consideration presents the most serious problem involved. In so far as their existence in the railway company is concerned, they must be considered separate and distinct from the franchise owned by the railway company. As already appears, it was generally assumed when the franchise was granted that such grant was sufficiently

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broad to give to the railway company all street rights essential to the erection and operation of its railroad. It was generally believed that all necessary easements belonged to the city, and that they passed under the franchise granted, and if these easements of light, air and access, so-called, were vested in the city instead of the abutting owners as subsequently held, they would have been included in such grant (Hindley *v.* Manhattan R'y, *supra*), and where the city itself owned the abutting property title to these private easements appurtenant thereto passed under the grant (Herzog 5876
v. N. Y. Elevated RR., 76 Hun 486, aff'd on opinion below, 151 N. Y. 665; Hindley *v.* Manhattan R'y, *supra*).

But long after the railway company secured its franchise these easements were held to be the property not of the city, but of the abutting owners (Story *v.* N. Y. Elevated RR., 90 N. Y. 122), and the burden of acquiring them was thereupon thrust upon the railway. That this burden was onerous has been recognized by the Court of Appeals. In Mayor *v.* Manhattan R'y (*supra*), where the question under consideration was whether or not a new 5877
line by way of extension to an existing system was burdened with the restrictions and obligations of the latter, the court took occasion to say: "When the Rapid Transit Act of 1875 was passed the answer to the question whether the plan therein provided for would prove a success was in great doubt. Certain privileges and franchises were provided to be given companies organized or operating a road under the act, and in return certain conditions and burdens were exacted from and imposed upon such companies. The persons who might be found willing to invest capital in

5878 the project might, in one sense, be termed 'adventurers,' because they would be investing their money in a scheme the result of which was then most doubtful, and which might leave them with their capital wasted, and with a costly and at the same time worthless structure on their hands. It is safe to say if at that time the interest of abutting owners had been understood to be as it has been since decided, not a railway would have been built under the provisions of this Act of 1875. It is a matter of public history that at this time
5879 capitalists were timid as to venturing their money in what seemed to be a somewhat visionary scheme. Some reasonable prospect of possible future profits to arise from the experiment would necessarily have to be presented before the risk would be taken. The above act was the means of testing by practical experiment the question of the feasibility of elevated railways and the possibility of their becoming a paying investment, while at the same time furnishing a satisfactory solution of the problem of rapid transit through the city. The roads have been built under the provisions
5880 of the act, and subsequent to their building (many think in consequence thereof) the upper part of the city has grown enormously, and has in truth become transformed from vacant swamps to streets bounded by rows of costly buildings. The roads have certainly shared in this prosperity, but the burden and effect of payment for the interests of abutting owners have been, still are and always must be felt most powerfully. The large amounts of these payments make a very strong drain upon the financial ability of the companies. That they are able to go on under the obligation and yet earn enough to make the property a valuable one

is surely not a cause of regret, nor should it furnish a reason for treating the companies other than in a fair spirit."

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It is the contention of the claimants that these easements thus acquired at great expense by the railway constitute property, absolute title to which is vested in it; that it is real estate, and exists separate and distinct from the railroad; that it is entitled to compensation therefor at the market value thereof; that the measure of this value and the subsequent damage to the railroad is the rule adopted against it when it was compelled to purchase the easements, namely, the difference in value of the abutting property before the removal of the spur and without the easements, and its value with the structure removed and the easements restored. It is urged that its property has been condemned against its will; that the removal of the structure has had the effect of at once restoring to the abutters these easements, now greatly enhanced in value; that the value of the abutting property as a whole is thereby greatly increased; that the city is to be benefited by the enormous increase in the taxable value of the abutting and neighborhood property, and that legally and equitably the railway is entitled to the present value of these easements included within the condemnation area, for which, it appears from the evidence, it was required to pay approximately the sum of $200,000 as future damages alone. In addition a substantial amount was paid as past damages, and a considerable portion of the easements were acquired by prescription without the payment of money damages.

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The city, on the other hand, contends that these easements are not owned by the railroad company;

that they are incapable of ownership separate and apart from the abutting property; that while the railway company took the easements, in one sense, it did not secure title thereto in a strict legal sense, but acquired the right merely to destroy them and to keep them destroyed in perpetuity for railroad purposes only; that when the railroad is destroyed the company's rights in the easements disappear and revert to the abutting owners, and that they are without value to claimants unless the railroad itself has value. The city's contention in respect
5885 to this phase of the case is thus stated in its brief: "The railway company owned at the time title vested in the city in this proceeding (a) a franchise, (b) an elevated railroad structure, (c) *and the right to maintain the structure for railroad purposes without liability to the abutting owners,* the three constituting one entire property, a railroad in a public street."

It is to be observed that the city recognizes in thought at least a right in the claimant separate from its franchise to maintain its structure as against abutting owners.

5886 It becomes necessary at the outset to consider the nature of this right or interest of the railway company, whether as easements, or whatever interest or right it may be called. That the easements were property in the hands of the abutting owners; that they were "taken" and appropriated by the railway company within the meaning of the constitutional provision requiring compensation cannot well be disputed. This clearly appears from the first decision of the Court of Appeals in Story *v.* New York Elevated Railroad (90 N. Y. 122) and its later decisions (Lahr *v.* Metropolitan Elevated R'y, 104 N. Y. 268; Kane *v.* N. Y. Elevated

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RR., 125 N. Y. 164). In fact, mere damage or injury, without such "taking," would not have entitled the abutters to compensation (Story *v.* N. Y. Elevated R'y, *supra*, dissenting opinion, p. 184). It was held that the erection of the structures constituted a "taking" of the easements and their appropriation by the railroad company (Lahr *v.* Met. Elevated R'y, *supra*). In later decisions the easements are spoken of as having become appurtenant to the railway property (People *ex rel.* Manhattan R'y *v.* Woodbury, 203 N. Y. 231), and such easements have been recognized not only by the courts of this state, but by the United States Supreme Court (Muhlker *v.* N. Y. & H. RR., 197 U. S. 544; Birrell *v.* Id., 198 U. S. 390; Sander *v.* State, 182 N. Y. 400). It is upon these expressions of our highest court that claimants rely and base their claim that the railway company is vested with title.

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At times the courts apparently have attempted to distinguish between these rights of abutting owners in the street and true easements. In Stevens *v.* New York Elevated Railroad Company (130 N. Y. 95, 101) it was said: "The characterization of these street rights as easements and implying that they are governed by the rules, and are subject to the limitations of common-law easements, tends to obscure the rights of abutting owners on the one hand and of the corporations on the other. They may be easements in the sense that the owner of land is sometimes said to have an easement for lateral support in adjacent land, or that the owner of land bordering on navigable waters having certain private rights to the shore is sometimes said to have an easement, but in neither case are the rights common-law easements."

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They have been classed as "quasi easements" (Am. Bank Note Co. *v.* N. Y. Elevated RR., 129 N. Y. 252, 272), "and to a certain extent they were regarded as *sui generis*, owing to the peculiar situation, and authorities apparently applicable were held not to apply" (Hindley *v.* Manhattan R'y, *supra*, 347), and "it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a con-
5891 tract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street and shall not be devoted to other and inconsistent uses" (White *v.* M. R. Co., *et al.*, 139 N. Y. 19, 25).

Nevertheless, they have been held to be easements to the extent at least that they cannot be owned separate and distinct from the ownership of the land to which they are appurtenant. In Kernochan *v.* N. Y. E. RR. (128 N. Y. 559) it was held that where premises were leased for a term of years *after* the construction of the elevated rail-
5892 road, the lessee was not the proper party to recover damages for the interference with the easements, but that such right belonged to the owner (reversioner), as it was an injury to the inheritance.

Pegram *v.* Elevated Railway Company (147 N. Y. 135) was an equitable action brought against the railway company for an injunction restraining it from maintaining the structure and for past damages. Upon the trial it developed that the plaintiffs had conveyed, *pendente lite*, the premises to a third party. In the conveyance to such third party the plaintiffs had reserved to them-

selves "all damages and claims for damages now or hereafter caused said party * * * and the right to convey or release" in the name of the grantee of said easements. The court cited the Kernochan case, and held that these easements were appurtenant to the premises themselves, and that "in the nature of things they are indissolubly annexed thereto until extinguished by release or otherwise. They are incapable of a distinct and separate ownership." It was held that the reservation in question could not be considered as an assignment of the easements, because these, as already stated, were appurtenant to the premises and bound to them, and as the premises had been conveyed to a third party the latter owned them, and alone could release them.

Conversely, in Shepard *v.* Manhattan Railway Company (169 N. Y. 160), it was held that the present owner of the abutting property was the sole party who could bring an action for further damage, and this in spite of the fact that mesne conveyances through which he claimed title had all reserved the right to such.

In McKenna *v.* B'klyn Union Elevated Railroad (184 N. Y. 391) the plaintiff brought suit against the defendant railway company for damages and injunctive relief by reason of the impairment of the easements. While the action was pending she conveyed the property, but reserved the easements, and all the right, title and interest thereto, including the suit in question. This deed was duly recorded and the defendant railway company had knowledge of it. It obtained a general release of the easements upon the payment of a certain sum to the grantee. The plaintiff then brought the action in question for the purpose of having the

grantee declared a trustee for her benefit, and sought to have the release given by the grantee set aside and canceled, and to have the grantee made a party.

WERNER, J., after reciting the law of the preceding cases and holding that such reservation had not created a trust in the easements themselves, held that the reservation had created a trust in the proceeds thereof; that under the facts disclosed the railway companies were justified in obtaining a release from the grantee, and that the
5897 sum reserved by the latter, in the absence of allegation and proof of fraud or obvious insufficiency, was conclusive as between the grantor and the grantee. All that the grantor obtained was an equitable lien upon the proceeds in the hands of the grantee.

Drucker *v.* Manhattan Railway (213 N. Y. 543) reaffirmed the doctrine of the last case, and further held that a subsequent grantee was held to notice of such reservation if recorded, and was bound thereby; that such grantee held the bare, naked legal title to the easements, the beneficial title
5898 thereto remaining in the grantor, who had reserved the easements to himself.

The seeming contradiction in these two lines of cases—those in which the railroad is said to have "taken" the easements, and those in which the easements are said to have been destroyed or "extinguished"—is more apparent than real. It is clear that the courts, in each class of cases, were considering these easements from a different viewpoint. In the "taking" cases they were viewing them as between condemnor and condemnee, and employed the word "taking" not so much to hold that the railroad had *possessed* itself of the ease-

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ments, as to indicate that by its act it had deprived the owner of them. It is well settled that a right for public use may be taken by simple destruction (A. W. Duckett & Co., Inc. *v.* U. S., 266 U. S. 149; Peabody *v.* U. S., 231 U. S. 530, 538). It was a "taking" within the meaning of the constitution, which does not provide that one cannot gain property without paying therefor, but that one cannot be *deprived* of property without compensation given. In the other class of cases the court was considering the question from the viewpoint of the abutting owner or successive owners. They 5900
were then considering the easements strictly as such. They used the term "extinguish" to apply to enjoyment rather than to ownership. It seems clear that in each instance the courts have used loosely words of technical precision to express by way of analogy an idea which because of its novelty and unusualness had no strict terminology of its own. Like all new developments in the law the subject in its inception was viewed largely in the aspect in which the particular situation presented itself, and when a further but different aspect was presented the court again employed the 5901
most available language without a consideration of all the "future possibles." And now that the question of these easements must once more be viewed from a different viewpoint, namely, that of the railroad company, it would seem that legal terminology of a more precise meaning and character must be found in order to convey by way of analogy a novel idea.

Considering the question in the light of the so-called "reservation" cases, and the easements from a common-law viewpoint, it is clear that the railroad company did not take or gain possession of

the easements formerly held and possessed by the abutting property owners. The easements consisted in the right of the abutting property owner to have the public highway remain free and unobstructed, so that the light, air and access normally appurtenant to his property should in no way be diminished. But as the railroad has no abutting property, and possesses only such property as it has in the street, it cannot be said to own any such easements. On the other hand, however, the parties are all in accord that it pos-
5903 sesses at least "a right" to impair the easements and keep them impaired in perpetuity. And just as these easements are said to be only quasi easements, and not true easements, and their invasion a quasi trespass, but not a true one (Bly *v.* Edison Electric Illuminating Co., 172 N. Y. 1, 7), so, too, this right to impair, though not strictly such, may come to be regarded as an easement in gross.

Some consideration of the effect of this proceeding in respect to this right may not be out of place. Does this right by virtue of condemnation and demolition of the structure revert *ipso facto* to the
5904 abutting owners, as contended by the city, or does it vest in the city? By virtue of physical laws, of course, the abutting owners again enjoy these easements the moment the structure is removed. But the ownership of the right to their destruction and the enjoyment thereof owned by the railroad might be said to vest in the city. If this is not so, then the city, if it hereafter determined to restore the elevated structure or act in some other manner so as to interfere with the light, air and access of the abutters within the area of condemnation, would be required again to pay for the destruction and enjoyment of the same easements for

which full consideration has already been paid to them and for which the city, by virtue of the statute under which this proceeding is conducted, is required to pay herein. The same would be true of the railroad if its franchise was again restored to it and the structure rebuilt. 5905

Let us assume that prior to the condemnation the railroad's structure had so deteriorated that it became a public nuisance by virtue of danger to the general public from its use as a railroad and the company was required to tear it down and rebuild. Could it reasonably be contended that 5906
before rebuilding these easements would have to be repurchased because in the meantime enjoyment of them reverted to their original owners? Or suppose that under permissive legislation the railroad had suspended operation of the spur and torn down the structure and that under the same legislation it had rebuilt. Would it again have to purchase the right to impair these easements?

It is to be borne in mind that these private easements are unlike the so-called public easements in that they did not spring into existence *ex necessitate* by the granting of the franchise. They 5907
seem analogous to a situation where a railroad, having been granted a franchise to operate over a certain route, is required in order to enjoy its use to purchase the land for its roadbed. In such case the railroad would own the land even after the railroad had been abandoned.

However, with the question of where title to this right vests we are not much concerned in this inquiry. The question here is, Of what has the condemnee been deprived? It is immaterial whether or not this deprivation or taking has resulted from an appropriation of the property by the condem-

nor or by the latter having destroyed the property. As already appears, property may be taken in condemnation by a mere destruction (A. W. Duckett & Co., Inc. *v.* U. S., *supra;* Peabody *v.* U. S., *supra*).

That such right is a species of property owned by the railroad and capable of separate appraisement has been established successfully by the city itself in other proceedings. As already appears, the city's right to treat it as property for the purposes of taxation has been recognized and sus-
5909 tained by the Court of Appeals (People *ex rel.* Manhattan R'y *v.* Barker, 165 N. Y. 305, 316; People *ex rel.* Manhattan R'y *v.* Woodbury, 203 N. Y. 231, 235).

My conclusion is, therefore, that however this right be regarded, whether an easement appurtenant or in gross, or a right to possession for the purpose of extinguishment and enjoyment, it is a property right which has become vested in the railroad and which it is entitled to enjoy in perpetuity; a right for which it has been taxed as property and for which it is entitled to be com-
5910 pensated.

It is argued that the railroad in the first instance was an invader, trespasser and wrongdoer with respect to these easements. Such argument, however, comes with poor grace from the city, for it authorized the unlawful acts. Moreover, the railroad company admittedly acted in good faith in the belief that its structure, as originally erected, was lawful, and it has paid large sums to the abutting owners.

In determining its value an important question to consider is whether it is owned solely for railroad purposes or whether it is available for any

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other purpose in the hands of the railroad or its grantee. Claimants assert an ownership separate and distinct from the franchise and the right to maintain and operate the railroad, and claim to be entitled to its value measured by any purpose to which it is adapted. As already appears, the city contends that it is owned for railroad purposes only, and that it has a value measured by such limited use.

In this connection a consideration of the manner in which the right to continue the impairment of the easement was acquired by the railroad is 5912
necessary. This acquisition was had in one of four ways: By conveyance, (1) voluntary through direct negotiations, and (2) pursuant to court judgments for money damages in lieu of injunction, (3) by condemnation and (4) by prescription.

Where written instruments were exchanged they seem to have partaken of a double nature. In so far as past damages were concerned they were in the form of releases. With respect to continuing trespass and future damages they were in the form of deeds. There seems to be no question that the 5913
conveyances made as a result of direct negotiations between the railroad company and the abutting owners were usually in the form of full covenant warranty deeds. Of a total frontage of approximately 1,600 feet of abutting property, these voluntary conveyances covered an approximate frontage of 483 feet.

Conveyances pursuant to judgments covered an approximate frontage of 700 feet. The judgments contained an alternative provision for payment by the railroad company to the abutting owners of certain damages "upon the latter's tender of a duly

5914 executed conveyance or grant of so much of the property * * * and of the easements appurtenant thereto, as has been taken and appropriated by the defendant for the purpose of their structure or railroad * * *."

These conveyances, pursuant to judgments, contain recitals that there are claimed to be appurtenant to the abutting property certain rights or easements to the enjoyment of the street and an interest or estate in the land forming the bed thereof, and a statement by the owner to the effect that

5915 by said deed he had hereby granted and conveyed "all right, title and interest * * * in said East Forty-second street and the land forming the bed thereof, and the easements therein appurtenant to said premises which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street * * *." These conveyances likewise were in the form of warranty deeds.

It is argued, not without reason, that under the voluntary conveyances the railroad company obtained a title not restricted to railroad purposes

5916 merely, but an unqualified right coextensive with the fee, such as would be taken by a steam railroad company which purchases through similar conveyances property in the open country for the construction of its road bed. It is argued that the conveyance of so much of the property as was necessary for the construction and maintenance of the railroad constituted a limitation of the quantity of the grant rather than a limitation of its quality. It is urged that because the property conveyed was of so unusual a character it admitted of no accurate description by metes and bounds, and the language employed, therefore, was the

only available language for describing the property conveyed. 5917

With respect to conveyances pursuant to judgment as a result of injunction proceedings a different situation is presented. The nature of the estate by these conveyed might be regarded as of the same character as in those by voluntary conveyance were it not for the fact that the courts have held that these injunction proceedings are but substitutes for condemnation, and that the railroad gained thereby the same title as it would acquire in condemnation (Am. Bank Note Co. *v.* N. Y. E. RR., 129 N. Y. 252, 270). This decision considered in connection with the rule that unless expressly authorized the railroad company by virtue of condemnation may take property only for its particular use, leads to the conclusion that the railroad obtained only a qualified fee as a result of the injunction proceedings. While this distinction is one to be noted, I am of opinion, as will hereafter appear, that so far as value is concerned it is a distinction without a material difference. 5918

There apparently was but one condemnation proceeding. From the petition and report of the commissioners and the order of confirmation the railroad company appears to have secured "so much of the privileges and easements or other interests in said East Forty-second street as are taken, appropriated or interfered with by the construction, maintenance and operation of the elevated railroad * * *," and that the railroad was authorized "to have and to hold the same * * * for the purpose of maintaining and operating an elevated railroad * * * the estate thereby taken in such land being limited to the right to use the same to maintain * * * and operate a railroad 5919

5920 thereon * * * so long as the aforesaid street is used and maintained as a public street * * *." Because of the limitation of the exercise of eminent domain heretofore noted and the language of the recitals it would seem that here the railroad obtained the right to destroy the easements for railroad purposes only, and thus acquired a qualified title.

By prescription the railroad acquired title to a frontage of approximately 400 feet. Prescription rests upon the fiction of a lost deed. However, as
5921 the grant presumed is no broader than the extent of the adverse use, and since the railroad used this right only for railroad purposes, the right acquired thereby was limited to such purposes (Lewis *v.* N. Y. & H. RR., 162 N. Y. 202; Bremer *v.* Manhattan R'y, 191 N. Y., 333).

But on the question of valuation the holding of an unqualified or a qualified fee does not seem to be material, for, as was held in Hudson & Manhattan Railroad *v.* Wendell (193 N. Y., 166), the inte[illegible]s a permanent one, and while it existed the railroad was entitled to the exclusive use, pos-
5922 session and control, the owner having no right to use, occupy or interfere therewith in any manner whatsoever, the use of the railroad being exclusive of the owner. In assessing the damages in such cases a possible reverter is never contemplated, and the operation is regarded as permanent and damages awarded on that basis (Hudson & Manhattan RR. *v.* Wendell, *supra;* Miner *v.* N. Y. C. & H. RR., 123 N. Y., 242).

With respect to the valuation of the various species of property involved herein the general principles of law applicable are well settled. The owner is entitled to "just compensation," and to

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have considered every element that can fairly enter into the question of valuation (Matter of the City of N. Y., 198 N. Y., 84). It is, moreover, entitled to the fair market value for any available purpose, and not merely for the purpose to which it has been devoted by the owner (U. S. *v.* Chandler-Dunbar, 229 U. S., 58; Boom Co. *v.* Patterson, 98 U. S., 403). Such value is dependent on and to be determined by the specific facts and circumstances of each case (Boom Co. *v.* Patterson, *supra*). But whatever such value, it is the value to the owner or condemnee and not to the condemnor (Boston Chamber of Commerce *v.* Boston, 247 U. S., 189), and it is the value thereof at the time of the taking (Brooks-Scanlon Corp'n *v.* U. S., 265 U. S., 106, 123).

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The rule that value for all available purposes must be considered has frequently been expressed and applied. In Boom Company *v.* Patterson (*supra*) the defendant was the owner of one island and parts of others in the Mississipi. Their position in the river specially fitted them for a log boom, for which purposes the plaintiff acquired them by condemnation. The jury awarded the plaintiff $9,358.33, and in a special verdict had stated that all of said value above $300 had been assessed because of the adaptability for this special purpose. In discussing the principle upon which compensation should be estimated, the court, *inter alia*, said (p. 407): "In determining the value of land appropriated for public purposes the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time

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5926 applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circum-
5927 stances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule, but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future * * *. Their adaptability for boom pur-
5928 poses was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands * * *. The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value find support in the several cases cited by counsel. Thus, in the Matter of Furman Street (17 Wend., 669), where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the City of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was

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applied, nor the intention of the owner in relation to its future employment, was a matter of much importance in determining the compensation to be made to him, but that the proper inquiry was 'what is the value of the property for the most advantageous uses to which it may be applied?' In Goodwin *v.* Cincinnati & Whitewater Canal Company (18 Ohio St., 169), where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in Young *v.* Harrison (17 Ga., 30), where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities, but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. Its value as a bridge site was therefore allowed in the estimate of compensation to be awarded to the owner."

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The Boom and the Furman Street cases are leading authorities, always cited and as often approved and followed. The Ohio Canal case, approved in the Boom decision, is interesting because the easements there condemned had become worthless for canal purposes and the company itself was insolvent.

In United States *v.* Chandler-Dunbar Company (*supra*), the court, quoting with approval from Boom Company v. Patterson (*supra*), said: "Although it is not proper to estimate land condemned for public purposes by the public necessities or its

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worth to the public for such purposes, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such purposes."

And it was further said, at page 81: "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes."

It is to be noted that a distinction is to be drawn between the measure of the damages and the evidentiary facts relevant thereto and to be considered therewith. While adhering to the general rule fixing the measure of damage, it would seem that because of the exceptional circumstances here present great latitude in the reception and consideration of evidence should prevail. This is especially so in view of the work of public benefit done by the railroad and its having unknowingly assumed in the first instance the hardships referred to in Mayor *v.* M. R. Company (*supra*).

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If there were a market price for the property taken that would be controlling (U. S. *v.* New River Collieries Co., 262 U. S., 341, 344; U. S. *v.* Chandler-Dunbar Water Power Co., *supra;* Boom Co. *v.* Patterson, *supra*). But property of the kind we are concerned with here is not dealt in at any market place—it has no ascertainable market price. Therefore its value must be determined by a consideration of such elements as original cost, replacement value, earning capacity, due weight being given to each, but none to be deemed necessarily controlling (Smyth *v.* Ames, 169 U. S., 466, and other cases cited *supra*). "The compensation to which the owner is entitled is the full and perfect equivalent of the property taken (Monongahela Navigation Co. *v.* United States, 148 U. S., 312,

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327). It rests in equitable principles, and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken" (Seaboard Air Line R'y *v.* United States, 261 U. S., 299; United States *v.* New River Collieries Co., *supra*, 343). 5935

In my opinion the court is entitled to consider what the property, including the right to impair these easements, originally cost, what it would cost today, depreciation, the earning power of the spur and its value as a component part of the Third avenue system. But none of these elements must necessarily control the judgment of the court to the exclusion of any other. 5936

"The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard" (United States *v.* New River Collieries Co., *supra*, 344; Monongahela Navigation Co. *v.* United States, *supra*, pp. 312, 327).

With these general principles in mind a specific consideration of market value, or exchange value, of the particular parts of the property taken is in order. With respect to the franchise my view of the elements that must be considered in determining its value has already been stated. Because of the exceptional circumstances of the case and the difficulty of determining with any degree of exactness the relative earning power of the spur when considered as a part of an established elevated railroad system, I am of opinion that a strict application of the net earnings' rule contended for by the city (People *ex rel.* Manhattan R'y *v.* Woodbury, 203 N. Y. 23[illegible]) cannot be recognized. As already noted, other elements that, in my opin- 5937

5938 ion, lend value to the franchise are before me, and my conclusion is that with these in mind, and upon all the evidence, an allowance therefor must be made. Claimants' expert estimated it to be worth $100,000. I am of opinion that this is excessive and that $25,000 is a fair and reasonable allowance.

The question of the value of the so-called private easements in the possession of the claimants is now to be considered. As already appears, it is clear that the claimants are entitled to their fair 5939 market value for all uses and purposes available to them or their grantees. But granting this, my conclusion is that save only in the possible case of the voluntary conveyances above mentioned the claimants hold the right to the impairment of the abutting property owners' easements of light, air and access solely for railroad purposes. Respecting the exception noted, I am of opinion that as a practical matter the same limitation applies, because the only conceivable use to which such right is available would be in the hands of one who might be vested with the right to maintain a 5940 thoroughfare at the level of the railroad's former structure. While the possibility of such future use of the streets of the city is now a matter of official and public discussion, the value of this right in connection therewith is of so speculative a character that it cannot be regarded as having any value for the purpose of this proceeding. I have, therefore, considered the right acquired by such voluntary conveyances as having a value only for railroad purposes.

But because this right in the possession of the railroad company was limited to the purposes indicated, it does not follow that it is without value.

Its acquisition was essential to the maintenance and operation of the company's railroad. Without it the company would have been a trespasser and required to tear down its structure and go out of business. As already appears, its original cost was several hundred thousand dollars. 5941

If the city had condemned the property now being taken within the first few years of the company's franchise, instead of at this late time, could it reasonably and justly have been contended that the railroad company would have been entitled to no award for what had but recently cost its stockholder so large a sum? I am unable to conceive why the claimants should be in any more unfavorable position with respect to this right and its value at one time than another, except in so far as the reasonable market value thereof might vary with time and change of conditions. 5942

The claimants offered evidence tending to show that if this right were to be acquired on the date when title vested in the city it would have cost the sum of $3,600,000. The city did not attempt to controvert this proof by the testimony of other experts. Presumably, in view of the conceded increase in the city's valuation of the abutting property predicated on the removal of the structure, and the fact that the city will later be called upon to sustain such assessments, it could not have successfully asserted that the value given by the claimants' experts was excessive. In fairness to the city, however, it should be noted that its counsel at all times disregarded the claimants' theory and that adopted by me, and for this reason refrained from calling experts on this phase of the case. 5943

Taking into consideration the original and

5944 *Opinion of O'Malley, J.*

present cost of acquisition, both of which are proper elements to be considered in arriving at the value of the property (State of Missouri *ex rel.* Southwestern Bell Tel. Co. *v.* Public Service Comm'n, 262 U. S., 276; Georgia R'y *v.* RR. Comm'n, 262 U. S., 625; Bluefield *v.* Public Service Commission, 262 U. S., 679; Banner Milling Co. *v.* State of N. Y., 240 N. Y., 533; Matter of City of N. Y., 198 N. Y., 84; see also Southern Bell Tel. & Tel. Co. *v.* Railroad Comm'n of S. S., 5 Fed. Rep., 2d, 77; Cons. Gas Co. of N. Y. *v.* Prendergast, 6
5945 Fed. Rep., 2d, 243; B'klyn Union Gas Co. *v.* Prendergast, 7 Fed. Rep., 2d, 628), the value of the franchise as already found and the elements on which its value is based, the depreciated value of the structure, other considerations heretofore noted, and all evidence before me, I am of opinion that the fair market value to the claimants of the right in perpetuity to the maintenance and operation of its railroad and the impairment in connection therewith of the easements of light, air and access of the abutting property owners, is the sum of $750,000. In reaching this conclusion I have
5946 given more weight to the original cost than the reproduction cost, for the reason that in my judgment the value of the railroad has not kept pace with the value of the abutting property.

We now come to the question of the value of the claimants' physical structure in the street and its value, if any. The claimants assert that they are entitled to be compensated on the basis of the fair reproduction value of the structure. The evidence of their experts tended to show that this so-called structural value or cost of reproduction, less depreciation, was the sum of $185,513. The city objected to proof of structural value upon the ground

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that it was incumbent upon the claimants, first, to prove that the spur had an earning capacity, or that a reasonably prudent man would build or purchase the property. The case of United States *v.* Boston C. C. & N. Y. Canal Co. (271 Fed. Rep., 877) is relied upon to support this contention. I am of opinion that this authority is not necessarily controlling on the question involved. That decision seems to have turned upon the element of abnormal prices. There is no evidence of abnormal prices in this proceeding. On the other hand, the claimants proved that the structure was 5948
suitable for and well adapted to the purposes of an elevated railway. This, in my judgment, is all that they were required to do (Matter of the City of N. Y., 198 N. Y., 84). As I have reached the conclusion that the company's franchise has some value, it necessarily follows that the claimants are entitled to be compensated for the physical structure necessary in its exercise. Structural value is not conclusive, but is some evidence of value (Matter of the City of N. Y., 198 N. Y., 84).

The city's evidence tended to show that the structural value was the sum of $120,438. There 5949
is thus a difference of approximately $65,000 in the testimony of the experts of the parties, and this difference seems to rest largely upon the fact that the city's experts claim that there has been a greater percentage of depreciation than testified to by the experts of the claimants. In support of its contention that the structure has only "junk value" the city calls attention to the fact that it it was sold to a wrecker by it for the sum of $255, who in turn realized about $6,000 on the resale of the steel girders.

I am of the opinion that the claimants are en-

5950 titled to substantial damages on account of the taking of their physical structure, and that this value must be based largely upon the structural value. I am of opinion that the value given by the city's experts should be adopted, and I shall therefore allow the sum of $120,438 as the value of the structure.

The next question relates to the cost of reconstruction of the station at Forty-second street and Third avenue, rendered necessary by the changes ordered by the Transit Commission. The claim-
5951 ants' evidence tended to show that they have expended a sum in excess of $95,000; that this covers only the changes ordered and deemed necessary by the Transit Commission, and does not include the cost of an additional stairway at the southeast corner of Third avenue and Forty-second street not so ordered; that all of such damages and consequent expense were rendered necessary by virtue of the condemnation proceeding.

An estimate of cost of changes deemed necessary by reason of the condemnation was testified to by an expert of the city and was a sum far
5952 less than the amount proved on behalf of the claimants. The city, however, offered no evidence, except to attack the claimants' figures by way of cross-examination respecting the cost of the work actually done. While I do not regard such cost excessive, I am of opinion that some doubt exists as to whether all of the expense incurred by the claimants was rendered necessary solely by virtue of the condemnation itself, and I have decided to make due allowance therefor. My conclusion is that the sum of $80,000 will be sufficient award in respect to this item of damages.

By stipulation there was tried herewith an ac-

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tion instituted by the claimants subsequent to the commencement of the condemnation proceedings. In such action the claimants sought to enjoin the city from a threatened removal of the structure in Forty-second street upon the ground that it was illegally maintained. A motion for a temporary injunction brought on in Special Term, Part I, was referred to me by the justice then presiding, and by consent an order was entered granting the temporary injunction, and at the same time the stipulation heretofore referred to was made. No evidence was offered by the city which would tend 5954
to establish that the claimants' structure was illegally maintained. Some reference was made to the location of the stairway leading down to the sidewalk in front of the Grand Central station at the Park Avenue station of the spur, and counsel for the city seemed to intimate during the taking of testimony that a certain sum should be deducted from the reproduction cost of the structure because of the alleged illegal position of this stairway. However, if the matter is of any consequence, sufficient allowance has been made therefor in the sum I have allowed as the value of the structure. 5955
I am satisfied that the claimants' structure was legally maintained and that the claimants, if such relief were necessary, would have been entitled to the injunction which was sought. The structure now having been removed, the question involved in that action has become academic and I do not deem that any decision or decree therein is necessary. But if counsel disagree they may submit findings and decree in accordance herewith.

The total allowance to the claimants is the sum of $975,438. Proceed accordingly (Law Journal of April 13, 1926).

5956 **Memorandum of O'Malley, J.**

Supreme Court—Extraordinary Special Term.

Matter of City of N. Y. (acquiring title to elevated railroad structure, &c.).—All objections overruled. Let corporation counsel prepare final decree. (Law Journal of January 4, 1928.)

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Waiver and Stipulation.

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It is hereby stipulated and agreed that the foregoing consisting of four volumes entitled "Papers on appeal from Final Decree of the Supreme Court, New York County" are true and correct copies of the original papers and of the whole thereof, together with all the evidence taken before the Supreme Court relevant to and sufficient to present the merits of the questions involved in these appeals, used in the Court below, and upon which the Final Decree of the Supreme Court appealed from was made, together with the said Final Decree of the Supreme Court appealed from, and the notices of appeal therefrom and the opinions of Mr. Justice James O'Malley, who made the Final Decree of the Supreme Court appealed from, all of which papers are now on file in the office of the Clerk of the County of New York; and certification thereof, pursuant to the provisions of Sections 170 and 616 of the Civil Practice Act, or otherwise, is hereby waived.

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Dated, New York, February 28, 1929.

George P. Nicholson,
Corporation Counsel,
Attorney for The City of New York, Appellant-Respondent.

5961

James L. Quackenbush,
Attorney for the Interborough Rapid Transit Company, Appellant-Respondent.

Murray, Aldrich & Roberts,
Attorneys for Manhattan Railway Company, Appellant-Respondent.

George Welwood Murray,
Attorney for Equitable Trust Company of New York, Appellant-Respondent.

Edmund W. Van Voorhis,
Attorney for Pershing Square Building Corporation, Appellant-Respondent.

Alex S. Lyman,
Attorney for The New York Central Railroad
5963 Company, The New York & Harlem Railroad Company and The New York State Realty and Terminal Company, Appellants-Respondents.

Hollander & Bernheimer,
Attorneys for Seward W. Ehrich, Inc., Appellant-Respondent.

Shearman & Sterling,
Attorneys for Robert Walton Goelet, 145 East 41st Street Corporation, The National City Bank
5964 of New York and The National City Realty Corporation, Appellants-Respondents.

Middlebrook & Sincerbeaux,
Attorneys for Manhattan Storage & Warehouse Company, Appellant-Respondent.

Parsons, Closson & McIlvaine,
Attorneys for Cooper Union for the Advancement of Science and Art, Appellant-Respondent.

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Page & Page,

Attorneys for Bowman Biltmore Hotels Corporation (Hotel Commodore), Corn Exchange Bank, B. L. M. Bates Corporation (Hotel Belmont), Bates-Bowman Corporation (Murray Hill Hotel), Guaranty Trust Co. of New York, as substituted Trustee of the Estate of John Curry, Deceased, J. Chr. G. Hupfel Co., Inc., Bowman Biltmore Hotels Corp. (Hotel Biltmore), The Bowery Savings Bank, Rogers Peet Company, Princeton Club of New York, Fritz G. Schmidt, Office Realty Corporation, William Volk, 202-204 East 42nd Street Corporation, Vanderbilt Avenue Building Corporation, Centerminal Corporation, F. & S. Rockaway Restaurant, Inc., Julius Tishman & Sons, Inc., Frederick Brown, James B. Ford, Anahma Realty Corporation, D. A. Schulte, Inc., The Oceanic Investing Company, Borden Realty Corporation, The R-W Realty Company, Inc., Trustees of the Estate of James Kelley, Deceased, Childs Company, J. Chr. G. Hupfel, J. Homer Cudmore, Alex Taylor & Co., Inc., Henry Hof, 140 East 27th Street Corporation and Carbide & Carbon Realty Co., Inc., Appellants-Respondents.

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Davies, Auerbach & Cornell,

Attorneys for Central Union Trust Company, Respondent.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 546

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title to the Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances of the MANHATTAN RAILWAY COMPANY, or by whomsoever owned, in East 42nd Street, constituting the existing 42nd Street Spur, in the Borough of Manhattan, City of New York, and also to acquire the right to extinguish all rights, easements and franchises of every nature whatsoever, of said Manhattan Railway Company, or by whomsoever owned, to construct, maintain and use said Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, MANHATTAN RAILWAY COMPANY, INTERBOROUGH RAPID TRANSIT COMPANY, CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee, etc., Claimants against THE CITY OF NEW YORK in the above-entitled proceedings,

Petitioners,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

CHARLES E. HUGHES, JR.,
Counsel for Petitioner William Roberts, Receiver of Manhattan Railway Company.

CHARLES FRANKLIN,
Counsel for Petitioner Manhattan Railway Company.

CARL M. OWEN,
J. OSGOOD NICHOLS,
Counsel for Petitioner Interborough Rapid Transit Company.

HAROLD C. MCCOLLOM,
MARTIN A. SCHENCK,
Counsel for Petitioner Central Hanover Bank and Trust Company, as Trustee, etc.

GEORGE WELWOOD MURRAY,
Counsel for Petitioner The Chase National Bank of the City of New York, as Trustee, etc.

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FIRST: The decree of the New York Court with respect to the private easements denied the due process of law required by the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily measured compensation therefor by the value of the easements as of the time of their acquisition by the railway, rather than as of the time of the taking, and ignored the availability of this property for sale or for uses for other than railroad purposes 10

SECOND: Due process of law was denied by the judgment that only junk value should be paid for the railway structure, which had been found to be suitable and well adapted to its purpose, and in awarding no compensation for the railroad's franchise and rights in the street 17

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No.....

IN THE MATTER

of

The Application of THE CITY OF NEW YORK, relative to acquiring title to the Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances of the Manhattan Railway Company, or by whomsoever owned, in East 42nd Street, constituting the existing 42nd Street Spur, in the Borough of Manhattan, City of New York, and also to acquire the right to extinguish all rights, easements and franchises of every nature whatsoever, of said Manhattan Railway Company, or by whomsoever owned, to construct, maintain and use said Elevated Railroad structures, tracks, stations, platforms, stairways and appurtenances.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of William Roberts, as Receiver of the Manhattan Railway Company, the Manhattan Railway Company (herein termed Manhattan), Interborough Rapid Transit Company (herein termed Interborough), Central Hanover Bank and Trust Company, as Trustee, and The Chase National Bank of the City of New York, as Trustee, for a writ of certiorari to review the judgment of the Supreme Court of the State of New York entered in the above entitled proceeding in the Office of the Clerk of the County of New York on September 13, 1934, upon the remittitur of the Court of Appeals of the State of New York dated July 3, 1934, respectfully shows to this Honorable Court:

A. SUMMARY STATEMENT OF THE PROCEEDINGS AND DECISION BELOW.

This is a proceeding brought by the City of New York to acquire the private and public street easements, railway structures and franchises constituting a part of the Manhattan Elevated Railway in the City of New York known as the 42nd Street Spur.

The petitioners are all claimants. The Manhattan-owned lines are operated by Interborough under a 999-year lease. Both Manhattan and Interborough are in receivership.

Central Hanover Bank and Trust Company is the Trustee under a first mortgage (securing $40,683,000 of bonds) and The Chase National Bank of the City of New York is the Trustee under a second mortgage (securing $4,523,000 of bonds) upon the Manhattan properties.

The judgment sought to be reviewed held that the claimants are entitled to compensation for the condemnation of the spur as follows:

1. For the elevated railway structure—$235, being the value when taken down, that is as *junk*.

2. For the public franchise to maintain the railway in the street and the public rights or estate in the street space occupied—*nothing*.

3. For the so-called private easements (property acquired from abutting property owners in respect of their easements of light, air and access)—$539,117.41, which figure was arrived at by taking a valuation, not as of the time of taking, but *as of the dates of acquisition by Manhattan* of the easements.

The spur was a free transfer shuttle built by Manhattan as part of its Third Avenue Line under a perpetual franchise and extended through East 42nd Street from a terminal opposite the Grand Central Station to Third Avenue (R. Ex. U, opposite p. 1932 of Claimants' Ex. AX).

The structure was the familiar elevated roadway and rails supported by girders resting upon iron columns sunk from 8 to 28 feet into the earth (R. Ex. AX, fol. 1010).

The perpetual public franchise had been duly granted by the State (*Mayor* v. *Manhattan Ry. Co.*, 143 N. Y. 1, 31-33); and the street space was occupied under the franchise.

After the granting of the franchise, and subsequent to the decision in *Story* v. *N. Y. Elevated Ry. Co.*, 90 N. Y. 122 (holding that the railway could not impair the easements of light, air and access of abutting owners, without compensation to them), Manhattan acquired during the years 1888-1904 undisputed title in fee to the private easements in question (R. Claimants' Ex. BX, p. 319).

The abutting owners, beginning in 1912, agitated the removal of the spur (R. Ex. AX, fols. 2474, 2478, 2493, 2481).

Condemnation was instituted by the City under the authority of Chap. 788, Laws 1917, as amended by Chap. 611, Laws 1919, and Chap. 635, Laws 1923, and pursuant to

Title 4, Chapter 17 of the Greater New York Charter. The statute of 1917 was permissive only and required the consent of Manhattan. The attitude of Manhattan was one of "complete opposition to the removal" (R. Ex. AX, fol. 3265). The statute of 1919 was then enacted providing that if the Public Service Commission should determine that the structure and appurtenances are no longer necessary or convenient to the public service, or constitute an impediment or obstruction to the public use of the street, and certain further procedural steps should be taken, the City should have the right to condemn and remove. The statute of 1923 made certain amendments not here material. On September 30, 1921 the City of New York instituted the proceeding and title vested on December 7, 1923.

The entire cost of acquiring the condemned property is borne, as to 65% by the owners of property abutting upon the line of the spur in whom the proceeding concededly revested title to the easements, and as to the remaining 35% by property-owners in an area of assessment extending from 34th Street to 50th Street and from Fifth to Second Avenues. The City bears no part of the cost (R. Ex. AX, 88).

The case was first tried in the New York Supreme Court by Mr. Justice O'Malley, the testimony and proceedings before whom are incorporated in the record in the four volumes of the record entitled "Exhibit AX". He found, as has not been disputed, that the *spur structure* "was suitable for and well adapted to the purposes of an elevated railway" (R. Ex. AX, 1983) and awarded its reproduction cost, less depreciation, $120,438 (126 Misc. 879; R. Ex. AX, 1984). For the *perpetual franchise* and the *public rights or estate in the street* he awarded $25,000 (126 Misc. 879, 911; R. Ex. AX, 1980). For the *private easements* he awarded $750,000, giving consideration to cost, franchise value, depreciation and other elements, rather than the pres-

ent reproduction cost (R. Ex. AX, 1981, 1982; 126 Misc. 879, 912). The claimants proved at the trial that as of the date of condemnation the market value of the easements determined by the difference between the value of the abutting property with full access of light and air and its value with these elements impaired by the railroad operation was $3,600,000 (R. Ex. AX, 852, 854, 869-872) and that it would have cost that sum to acquire these rights on that date. The City, as stated by the court, did not controvert this evidence. The court awarded also an undisputed item of $80,000, representing reconstruction costs at Third Avenue.

Upon cross-appeals, taken by all parties, the Appellate Division, First Department, reversed the final decree of Mr. Justice O'Malley, except as to the said undisputed item, holding that the structure should be valued as scrap, that the franchise and public street rights were of no value and that the value of the private easements should, upon a new trial, be determined solely "upon the basis of the value judicially determined at the time of the original acquisition" (1888-1904) (Opinion, R. 301, 305; 229 A. D. 617, 630).

The issues thus remitted were first tried before Mr. Justice Mullan, who died after rendering an opinion reported in 141 Misc. 565 (R. 331), and preparing a tentative decree, but before signing the final decree. Upon a retrial, Mr. Justice Ingraham, upon the same testimony, exhibits and rulings (R. 182), adopted the opinion of Mr. Justice Mullan (R. 341, 143 Misc. 129), awarding $235 for the structure as scrap, and for the private easements an amount based on their judicially determined value "at the time of their original acquisition". There was one easement (known in this proceeding as the "Depew Place easement") for which no compensation whatever was awarded. At the time the railroad was constructed, the plot to which this easement was

appurtenant (having a frontage of fifty feet on 42nd Street) was owned by the New York Central Railroad. In 1885, and before any prescriptive period had run in favor of the Railroad, the City purchased the plot and used it as a public street known as Depew Place. In 1905 the New York Central repurchased this plot and it thereafter remained in that private ownership. Mr. Justice Mullan held (141 Misc., pp. 568-570; R. 333-336) that title to this easement passed to Manhattan, not from the private owner, but from the City, immediately upon the latter's acquisition of title in 1885, by virtue of its franchise grant; but that, inasmuch as the Appellate Division had held the franchise to be without value, this easement could not be included in the award.

Upon cross-appeals taken by all parties, the Appellate Division approved the application of its rule of valuation made by the trial court and unanimously affirmed the final decree without opinion (R. 388; 238 App. Div. 832).

Cross-appeals to the Court of Appeals were taken by the same parties by leave of the Appellate Division both from its final order entered March 24, 1933 (R. 384), affirming Judge Ingraham's decision, and from its intermediate order dated May 9, 1930, reversing that of Mr. Justice O'Malley (R. 345-385). The Court of Appeals on July 3, 1934, affirmed the judgment (R. 410), two of the Judges dissenting, the majority opinion being written by Pound, *Ch. J.*, and the dissenting opinion by Lehman, *J.* (265 N. Y. 170).

Judgment on the remittitur from the Court of Appeals was entered September 13, 1934 in the Supreme Court (R. 427).

B. SPECIFICATIONS OF ERRORS.

The Supreme Court and the Court of Appeals erred:

1. In measuring the compensation for the private easements of light, air and access, acquired by Manhattan from

the abutting property owners, upon the basis of the value judicially determined at the time of the original acquisition of these rights, rather than at the time of the vesting of title herein, and in ignoring the availability of the property for sale or for other than railroad uses;

2. In awarding no compensation with respect to the private easement in connection with the Depew Place frontage;

3. In awarding for the elevated structure only its scrap value, and in not awarding therefor its structural value based on cost of reproduction less depreciation;

4. In awarding no compensation for the Railroad's franchise or its rights thereunder to occupy East 42nd Street.

C. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(1) The decree of the New York court with respect to the private easements denied the due process of law required by the Fourteenth Amendment to the Constitution of the United States. It violated the fundamental rule that in condemnation compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof, and ignored the availability of the property for sale or for uses for other than railroad purposes. The sole rule of valuation of the said easements adopted by the Appellate Division and affirmed by the Court of Appeals was "the value judicially determined at the time of the original acquisition of these rights", that is, 1888 to 1904 (R. 283, 305; 229 A. D. 617, 630). Available uses were not considered. Nor was market or sale value considered. No compensation whatever was made for the so-called "Depew Place easement" on the arbitrary ground that, although it was of great value

at the time of taking (R. 335), the Railroad's title thereto was derived from the public franchise which the New York courts held to be without value.

(2) The spur structure was found, as is not denied, to be "suitable for and well adapted" to the railway uses to which it was devoted (126 Misc. 879, 913; R. Ex. AX, 1983). It was a free transfer facility used on an average by over thirteen thousand passengers daily (R. Ex. AX, 573). The finding that it was worth $120,438 (R. Ex. AX, 1983) was reversed and a junk value of $235 has been awarded (R. 340). The spur was built to reach Grand Central Station under the requirements of the franchise. At the time of taking the structure was *real estate;* it was valued as *junked personalty.* The franchise to operate the spur was found by Mr. Justice O'Malley to be a part of the perpetual and profitable franchise of the Third Avenue Line (R. Ex. AX, 1956, 1958), and to have substantial value. He awarded for it and for the perpetual right to occupy 42nd Street, which he termed the public easement, $25,000 (126 Misc., p. 911; R. Ex. AX, 1980). The decree in this respect was reversed on the ground that the operation of the spur in and of itself was without profit, ignoring the fact that the spur and the Third Avenue Line were operated under a single franchise. Denial of *any substantial compensation* for the structure, and of *any value whatever* for an integral part of a franchise perpetual in terms and for the rights in the street thereunder, violated the Fourteenth Amendment.

It is submitted that, in respect of the matters set forth in subdivisions (1) and (2) of this heading C, the state court has decided federal questions of substance in a way contrary to the applicable decisions of this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme

Court of the State of New York, entered in the above-entitled proceeding in the office of the Clerk of the County of New York, on September 13, 1934, upon the remittitur of the Court of Appeals of the State of New York, dated July 3, 1934.

Dated, New York, November 26, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company,
By CHARLES E. HUGHES, JR.,
Counsel for Petitioner.

INTERBOROUGH RAPID TRANSIT COMPANY,
By CARL M. OWEN,
J. OSGOOD NICHOLS,
Counsel for Petitioner.

MANHATTAN RAILWAY COMPANY,
By CHARLES FRANKLIN,
Counsel for Petitioner.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee,
By HAROLD C. MCCOLLOM.
MARTIN A. SCHENCK,
Counsel for Petitioner.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Trustee,
By GEORGE WELWOOD MURRAY,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals (R. 410) rendered July 3, 1934, is reported in 265 N. Y. 170. The opinion of the Appellate Division, First Department, on the first appeal is reported in 229 App. Div. 617 (R. 283). The opinion of the Trial Court upon the initial trial is reported in 126 Misc. 879 (R. Ex. AX, 1933-1985). The opinion of Mr. Justice Mullan upon the first trial of the issues remitted by the Appellate Division is reported in 141 Misc. 565 (R. 331-340). The opinion upon the retrial of the remitted issues by Mr. Justice Ingraham (adopting that of Mr. Justice Mullan) is reported in 143 Misc. 129 (R. 341). The Appellate Division affirmed

Mr. Justice Ingraham's decision without opinion (238 App. Div. 832; R. 407-408).

JURISDICTION.

The judgment of the Supreme Court of New York, on the remittitur of the Court of Appeals, was entered on September 13, 1934 (R. 426-427). The jurisdiction of this Court is invoked under Judicial Code Section 237, as amended by Act of Congress, September 6, 1916, Chapter 448, Section 2, 39 Stat. 726, and Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937.

The constitutional questions relied upon were raised upon the record in all of the trials and appeals herein and upon the briefs and arguments (R. Ex. AX, 155-188; R. 93-140, 188-190, 195). The judgment of the Court of Appeals could not have been rendered without deciding them. These contentions are specifically referred to in the dissenting opinion of Lehman, *J.* (265 N. Y. p. 183; R. 421).

STATEMENT AND ASSIGNMENT OF ERRORS.

A statement of the facts and the errors relied on will be found in the petition.

ARGUMENT

FIRST: The decree of the New York Court with respect to the private easements denied the due process of law required by the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily measured compensation therefor by the value of the easements as of the time of their acquisition by the Railway, rather than as of the time of the taking, and ignored the availability of this property for sale or for uses for other than railroad purposes.

The origin of these private easements was the decision of the Court of Appeals of New York in 1882, in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, that the owners of

property abutting on the streets occupied by the elevated structures had easements of light, air and access, which were property within the meaning of the Constitution and which the State's franchise to the railroad to occupy the streets was incapable of conveying. It was held that the construction of the railroad was a "taking" of this private property, and this holding was necessary to the decisions, for the law did not permit recovery for consequential injury to private property caused by operations for public use, but only for its *taking* for such purpose.

The principles decided in the *Story* case were reaffirmed in *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, and have by repeated decision become a firmly established rule of property. *Muhlker* v. *New York & Harlem Ry. Co.*, 197 U. S. 544. The Appellate Division (229 App. Div., p. 623) quoted from a typical sample of the combination grant and release which was used upon the Railroad's acquisitions of these easements. See conveyances, R. Ex. AX, 1646-1717.

The City's contention that the "taking" by the Railroad Company of the abutter's easements was a taking by destruction and did not result in the acquisition by the Railroad of any property which it could continue to possess, has been foreclosed by the decisions of the Court of Appeals of New York. That court held in *Hindley* v. *Manhattan Railway Co.*, 185 N. Y. 335, that the railroad might acquire the easements by prescription. "Prescription rests upon the presumption of a grant * * *." (*Scallon* v. *Manhattan Railway Co.*, 185 N. Y. 359, 363.) "Where no express grant can be allowed the law will not resort to the fiction of an implied grant so as to create a prescriptive right." (*Matter of the City of New York* (*Piers Old Nos. 8-11*), 228 N. Y. 140, 145.) These easements in the hands of the Railroad Company have been taxed as property. *People ex rel. Manhattan*

Railway Co. v. *Barker*, 165 N. Y. 305; *People ex rel. Manhattan Railway Co.* v. *Woodbury*, 203 N. Y. 231. In the *Barker* case, the Court said (p. 316):

> "The rights acquired are the easements of light, air and access of the abutting property owners in the streets occupied by the elevated railroad structure, and when these easements are acquired by the company its structure becomes lawful and its right to operate its road in front of the abutting property unquestioned. (*Messenger* v. *Manhattan R. Co.*, 129 N. Y. 502). The acquirement of these easements, it is true, destroys in a measure the value of the abutting property, but to the extent that such value is destroyed, that of the railroad company is increased. We think, therefore, that the fee damages represent property that may be assessed."

As Judge Lehman said in his dissenting opinion in the present case, "After the owner has been compelled to pay for the acquisition of these rights because the courts have held that they were property rights, and after such rights have been made subject to taxation by the State because they constitute property rights, it seems to me too late for the State to urge that it may destroy these rights without paying for them the value which the owner could otherwise have obtained as the price of their sale or abandonment" (265 N. Y., pp. 189-190; R. 420). See *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84, 88.

The Court of Appeals in this case directed the affirmance of a decree which, under the instructions of the Appellate Division, measured compensation "upon the basis of the value judicially determined at the time of the original acquisition of these rights". The result has been to fix compensation upon what, except for the easements which had been acquired by prescription, was, as the majority opinion

of the Court of Appeals recognized (265 N. Y., p. 181; R. 412), a form of cost basis and, as to all the easements, upon the basis of values at dates remote from the time of the taking. We submit that this constitutes a taking of this property without due process of law in violation of the Fourteenth Amendment.

The rule that in condemnation compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof, is fundamental. In *Olson* v. *United States*, 292 U. S. 246, this Court, after observing that "the judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance", referred to its statement of the requirement in *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324, of "a full and exact equivalent" for the property as an apt expression of the requirement of both the state and federal constitutions (pp. 254-255). The Court said (p. 255):

> "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money, *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306. *Jacobs* v. *United States*, 290 U. S. 13, 17. 2 Lewis, Eminent Domain, 3d ed., §682, p. 1172. It may be more or less than the owner's investment. * * * It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases*, 230 U. S. 352, 454."

The value of these private easements has always been judicially recognized to be the difference between the value of the abutting property when subject to the Railroad's easements and its value when not so subject, and this was the basis of the opinions of market value given by the undisputed

testimony of the Railroad's expert at the trial. See *People ex rel. Manhattan Ry. Co.* v. *Barker*, 165 N. Y. 305, 316; *Muhlker* v. *New York & Harlem R. Co.*, 197 U. S. 544, 571. The Appellate Division recognized (229 App. Div. 624; R. 295) that these easements "have been judicially valued as representing the amount which has been taken from the value of the abutting property after allowing for all benefits received". But the Appellate Division and the Court of Appeals held that this method must be applied to real estate values at the time of the Railroad's acquisition of the property between the years 1888 and 1904 instead of such values at the time of the condemnation in 1923.

The New York courts' theory that compensation must be determined by conditions existing at the time of the Railroad's acquisition led to the anomalous result that no compensation whatever was awarded with respect to the so-called "Depew Place easement", which, at the time of the condemnation, was no different in character or value from the other easements taken.

Furthermore, the New York courts based their decision in great part upon the ground that the Railroad's operation of this spur taken by itself was not profitable. We submit that, in thus limiting consideration to the Railroad's use of the property and ignoring its availability for other uses, this also violated the constitutional guaranty. This Court, in *Olson* v. *United States*, said (pp. 255-256):

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely

> to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Comm'n*, 291 U. S. 227. 2 Lewis, Eminent Domain, 3d ed., §707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., §220, p. 671."

And this Court further said that its prior decision in *Boom Company* v. *Patterson*, 98 U. S. 403, cited in the passage above quoted, "is authoritative in state courts in all condemnation cases in which the owner invokes protection of the due process clause of the Fourteenth Amendment" (292 U. S., p. 259). Among the judicial applications of this rule are the following, which are particularly apposite to this case: *Goodin* v. *Cincinnati & Whitewater Canal Co.*, 18 Oh. St. 169; *In re Gales Street*, 47 Wash. 603. See also *In re The City and South London Ry. Co. and The Rector, etc.* [1903] 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords).

Judge Lehman said in his dissenting opinion (265 N. Y., p. 187; R. 418):

> "It is clear, I think, that if the railway company were not compelled to abandon the structure, the abutting owners would be willing to pay the railway company a very substantial amount for its abandonment with its consequent accretion of great additional value to their land and buildings. That amount would constitute the realizable value of the railroad property to its owner, even if its user for railroad purposes were unprofitable and a burden upon the owner."

This conception of the availability of these easements for use by the abutting owners and the possibility of sale thereof to them was by no means speculative, as the New

York courts appear to have supposed; nor does it infringe the rule that the value to be ascertained does not include "any element resulting subsequently to or because of the taking" (see *Olson* v. *United States*, 292 U. S., p. 256). Under Section 237 of the New York Railroad Law, the Railroad had for years before the condemnation had the right, by the required corporate action, to make a declaration of abandonment of any portion of its route subject to approval thereof by the Public Service Commission. This obviously made possible a negotiation with the abutting property owners. So did the first permissive statute looking towards the removal of this very spur (Laws 1917, c. 788). The relatively small number of abutting owners and their active desire to be rid of the spur satisfies every requirement of practicability of such a disposition.

The proceeding, in effect, was one whereby at the instance of the property owners the structure was removed and the easements were restored to them, the cost being imposed upon them. This situation was clearly recognized by the Appellate Division (229 App. Div. 617, 624; R. 295). The condemnation freed the property from any limitations of railroad user. (*Matter of Ninth Avenue and 15th Street*, 45 N. Y. 729, 732, 733, 735; *In re The City of South London Ry. Co. and The Rector, etc., supra.*

As Judge Lehman said in his dissenting opinion (265 N. Y., p. 191; R. 421):

> "The amount fixed by the courts below as the present value of the property rights bears no relation to any value which might be obtained from user of the property, or as the price of its abandonment or transfer. It is purely arbitrary. It may be greater or less than the value. Property is taken without due process of law when the compensation paid is fixed arbitrarily rather than by a determination of the value which might be obtained from user and sale."

SECOND: Due process of law was denied by the judgment that only junk value should be paid for the railway structure which had been found to be suitable and well adapted to its purpose and that no compensation should be made for the Railroad's franchise and rights in the street.

The spur was built under a franchise granted to Manhattan and its predecessor, New York Elevated Railway Company, *requiring* connection "with other steam railways or the depots thereof" (which included the Grand Central Station). Section 36, Chapter 606 of the Laws of 1875 (Rapid Transit Act) (R. Ex. AX, 1877, 255-256, 1621); *Mayor* v. *Manhattan Ry.*, 143 N. Y. 1, 31, 32, 33 (R. Ex. AX, 1249, 1326, 1374, 1375, 1528; Claimants' Ex. D, opposite page 1902, R. Ex. AX). It was found and not disputed that it "was suitable for and well adapted to the purpose of an elevated railway" (R. Ex. AX, 1983). When taken it daily accommodated an average of 13,421 passengers on the basis of counts taken by the City and claimants (R. Ex. AX, 572-573). Its use was increasing (Claimants' Ex. K-6, opposite page 1920, R. Ex. AX; Opinion, R. Ex. AX, 1949) and was then greater than in most years of its operation. The dangerous congestion of 42nd Street required a determination by the Public Service Commission that public convenience and necessity would be subserved by the spur removal; but property devoted to public convenience under a franchise requirement and adequately serving its required function cannot be confiscated by an award of nominal "junk value".

The acceptance of the franchise and the providing of the spur structure under its requirement constituted a contract between the State and the Company which was property protected by the Constitution (*New York Telephone Co.* v. *State*, 169 App. Div. 310, aff'd. 218 N. Y. 738; *Los Angeles* v. *Los Angeles Gas & Electric Corp.*, 251 U. S. 32).

The elevated structures erected under the Manhattan franchise cannot be taken without just compensation (*Manhattan Ry. Co.* v. *Mayor*, 89 Hun 429, 431).

Mr. Justice O'Malley, citing and following *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84, held that the structure should be valued at reproduction cost less depreciation; that claimants' experts calculated this amount at $185,513, and the City's experts at $120,438; that the difference resulted largely from the greater depreciation claimed by the City's experts; and that the value given by the City's experts should be adopted (126 Misc., pp. 879, 912-913; R. Ex. AX, 1984). He held that the franchise had value and awarded for it, and the perpetual right to occupy 42nd Street, $25,000 (126 Misc., p. 911; R. Ex. AX, 1980).

The judgment appealed from awards a nominal junk value of $235 for the structure and nothing for the franchise. The ground of this holding was that operation of the spur was not profitable (229 App. Div., pp. 620, 622; R. 290; 265 N. Y., p. 182; R. 414). However, neither appellate court disapproved the holding of Mr. Justice O'Malley, that while the spur, taken by itself, showed an operating loss

> "It was an integral part of an elevated railroad system which is shown upon the evidence to be operated on a paying basis * * *. Steam railroads, no doubt, have many spurs and switches which may be maintained and operated at a loss to the companies, yet their maintenance and operation may promote the maintenance and operation of the complete railroad system and thus lend some value to their franchises" (126 Misc., p. 896; R. Ex. AX, 1956).

Mr. Justice O'Malley also referred to the possibility that the Manhattan-Interborough lease might be terminated (both companies have since gone into receivership), in which event

the spur might be of great value to the Manhattan's Third Avenue line, in competition with the Interborough Lexington Avenue line, especially as the Manhattan in separate operation would not be limited to a five-cent fare; and held (citing *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 125, 126) that such facts should be taken into consideration with the other circumstances (126 Misc., p. 897; R. Ex. AX, 1957-8).

The Court of Appeals, while also recognizing that the spur was part of a system "operated at a profit," held that "the finding that the Forty-second street franchise had no value should not be disturbed" (265 N. Y., p. 182; R. 414). There has in fact never been any finding, except in the most limited sense, that the franchise had no value. It has been found that the spur produced an operating loss; but equally it has been found that the spur was a part of a system operated at a profit. The railroad franchise, when accepted and acted upon, was an entire contract, not a collection of parts. See *Grand Trunk Western Ry. Co.* v. *South Bend,* 227 U. S. 544, 555-556, wherein this Court held that an attempt to terminate a part of the franchise by reason of traffic congestion was a violation of the contract clause of the federal constitution.

Manhattan consistently opposed the condemnation of the spur (126 Misc., pp. 883, 885, 899, 914; R. Ex. AX, 1936, 1939, 1961, 1985; 229 App. Div. 620; R. 288). Morever, it is the settled law of New York that under the theory of condemnation the property is taken from the owner "against his will" (*Matter of City of New York (Blackwell's Island Bridge),* 198 N. Y. 84, 86; *Jackson* v. *State,* 213 N. Y. 34, 35).

Where, as in the present case, the structure is found to be suitable and well adapted for its purpose, and used as part of a plant, the cost of reproduction less depreciation is

ordinarily the proper measure of value, both in rate litigation (*Denver* v. *Denver Union Water Co.*, 246 U. S. 178), and in condemnation (*Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84; *New York Telephone Co.* v. *State*, 169 App. Div. 310, 321; aff'd. 218 N. Y. 738). The award by Mr. Justice O'Malley was based upon the lowest estimate in the record. Where the property is a profitable concern, it may be given a going value *additional* to reproduction cost less depreciation (Brewer, Sanborn and Thayer, *JJ.*, in *National Waterworks Co.* v. *Kansas City*, 62 Fed. 853, 865 (C.C.A. 8th); *Denver* v. *Denver Union Water Works Co.*, 246 U. S. 178, 185-6). We have seen no decision which holds that where property taken is a part of a profitable system, the constitutional protection against confiscation is to be denied because the particular part taken produces an operating loss. As an example to the contrary, see *Matter of Mayor*, 39 App. Div. 589, wherein a reserve gas plant, which had not been in use for several years but had been kept up, was allowed not only structural value but also going value, although obviously its ownership must have produced operating loss, not profit.

The structure was real estate (*People ex rel. N. Y. Elevated R. Co.* v. *Commrs.*, 82 N. Y. 459, 462; *Manhattan R. Co.* v. *Mayor*, 89 Hun 429, 431). It was error to value it as detached junked personalty (*Denver* v. *Denver Union Water Works Co.*, 246 U. S. 178, 191). The City takes, and must pay for, annexed property "as it then exists"—that is, as realty (*Matter of City of New York (Allen Street)*, 256 N. Y. 236, 241). In *Jackson* v. *State*, 213 N. Y. 34, the Court reversed an award for fixtures because they had been valued not as real estate but as "second-hand articles" severed from the warehouse. The Court, per Cardozo, *J.*, said that such a valuation was "intolerable". In effect, the valuation herein

was not as of the time of taking but as of a subsequent date—that is, after removal,—contrary to the established rule which is inherent in due process (*Olson* v. *U. S.*, 292 U. S. 246, 255).

The protection against confiscation by eminent domain of the whole category of properties not profitable in and of themselves but provided under franchise requirements by railway and public service corporations, is involved in the determination of the question here raised relating to the structure and franchise taken in this proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

No. 546—OCTOBER TERM, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

against

THE CITY OF NEW YORK, and others,

Respondents.

PETITIONERS' REPLY BRIEF.

This brief is submitted only because the respondents' brief relies most strongly upon a contention not heretofore emphasized.

They repeatedly refer to the determination of the Public Service Commission, and to the failure of Manhattan Railway Company to appeal therefrom, as if the Commission had made some determination as to value which is *res adjudicata* herein. There was no determination bearing upon value in condemnation. The determination was under a statute agitated by property owners and designed to clear the way for condemnation. The statute authorized condemnation if the Commission should find *either* lack of public convenience and necessity *or* obstruction to the street. The obstruction was indisputable, so that an attempt to review the Commission's determination would have been futile. The statute expressly provided for later condemnation of "structure", "easements" and "franchises" (Laws

1919, Chap. 611; R. Ex. AX, 1877), for which just compensation was to be paid. At the date of the determination conditions were not the same as at the date of condemnation; for example, the Commission found (April 22, 1921) that the trend of traffic on the spur was downward whereas, at the date when title vested (December 7, 1923), such trend was upward (Petitioners' Brief, p. 17).

This contention, which has so large a place in respondents' brief, is neither material nor relevant.

Dated, December 22, 1934.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONERS

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IN THE

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No. 546

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

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against

THE CITY OF NEW YORK, and others,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR PETITIONERS

Writ of certiorari was granted by this Court on January 7, 1935, on the application of the petitioners to review the judgment of the Supreme Court of the State of New York entered in the Office of the Clerk of the County of New York on September 13, 1934, in a condemnation proceeding brought by the City of New York to acquire the private and public street easements, railway structures and franchises constituting the part of the Manhattan elevated railway in the City of New York known as the 42nd Street spur. This judgment was entered upon the *remittitur* of the Court of Appeals of the State of New York dated July 3, 1934.

The petitioners were the claimants in that proceeding. The Manhattan Railway Company (hereafter called "Manhattan") was the owner of the elevated railways subject to a lease made January 1, 1903, to Interborough Rapid Transit Company (hereafter called "Interborough") for a period of 999 years from November 1, 1875. William Roberts is the Receiver of Manhattan appointed by order of the United States District Court for the Southern District of New York entered September 6, 1932. He was made a party to this proceeding by order of the Supreme Court, New York County, entered December 21, 1932. Central Hanover Bank and Trust Company is the trustee under a first mortgage (securing $40,683,000 of bonds) and The Chase National Bank of the City of New York is trustee under a second mortgage (securing $4,523,000 of bonds) upon the Manhattan's properties.

The respondents are the City of New York, which condemned the spur, and certain assessed property owners.

By the judgment under review the claimants were awarded compensation for the condemnation of the spur as follows:

> (1) For the elevated railway structure—$235, being the value when taken down, that is as *junk;*
>
> (2) For the public franchise to maintain the railway in the street and the rights or estate in the street space occupied—*nothing;*
>
> (3) For the so-called private easements acquired by the Railroad from abutting property owners—$539,117.41, which figure was arrived at by a valuation of these easements *on the basis of the dates of their acquisition by the Railroad.*

OPINIONS BELOW

The prevailing and dissenting opinions of the Court of Appeals (R. 410) rendered July 3, 1934, are reported in 265 N. Y. 170. The opinion of the Trial Court upon the first trial (*R. Ex. AX, Vol. IV, 1933) is reported in 126 Misc. 879. The opinion of the Appellate Division, First Department, on the first appeal (R. 283) is reported in 229 App. Div. 617. The opinions of the Trial Court (R. 331, 341) upon the trial of the issues remitted by the Appellate Division in its opinion are reported in 141 Misc. 565 and 143 Misc. 129. The decision of the Appellate Division, First Department, affirming without opinion this decision of the Trial Court (R. 407) is reported in 238 App. Div. 832.

JURISDICTION

The judgment of the Supreme Court, on the *remittitur* of the Court of Appeals, was entered on September 13, 1934 (R. 426-427). The jurisdiction of this Court is invoked under Judicial Code, Section 237, as amended by Act of Congress September 6, 1916, Chapter 428, Section 2, 39 Stat. 726, and Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937. Petition for writ of certiorari to review the judgment was filed November 27, 1934, and granted by this Court on January 7, 1935.

---

*"Exhibit AX" is the designation given in this proceeding to the record, in four volumes, of the first trial of this proceeding before Mr. Justice O'Malley. The remaining volume (herein designated simply "R") is the record of the proceedings subsequent to the first trial. All references to the Record and to Exhibit AX are to pages, rather than to folios.

The rights under the federal constitution relied upon in the petition for writ of certiorari and in this brief were raised in claimants' objections to the tentative decrees above referred to, upon the record in all of the trials and appeals herein and upon the briefs and arguments (R. Ex. AX, Vol. I, 157-158, 173-176, 181-182; R. 103-106, 113-114, 122-123, 136-139, 189-190, 195). The judgment of the Court of Appeals could not have been rendered without denying them. The constitutional questions are specifically referred to in the dissenting opinion of Judge Lehman (265 N. Y. p. 183; R. 421).

The City of New York and certain assessed property owners on December 4, 1934, obtained an order extending until February 9, 1935, the time within which they might file a cross-petition for certiorari. A cross-petition was filed by certain of the property owners, but not by the City of New York, on February 8, 1935, which was denied by this Court on March 18, 1935 (No. 691, October Term, 1934).

STATEMENT

This condemnation proceeding was instituted by the City of New York on July 13, 1923, pursuant to the special legislative enactments hereafter described. Title vested on December 7, 1923 (R. Ex. AX, Vol. I, 94), and the structure was removed in May of 1924 (R. Ex. AX, Vol. II, 986).

This 42nd Street spur was erected in 1877 and 1878 and was put into operation in the latter year (R. Ex. AX, Vol. I, 273). It was built as part of the Third Avenue line, under a perpetual franchise, to form a connection with the Grand Central Terminal, and after the first few months

was operated as a free transfer shuttle. It extended from the elevated station at 42nd Street and Third Avenue westerly about 900 feet through East 42nd Street to a terminal on Park Avenue opposite the Grand Central Station. The structure was the familiar type of elevated roadway and rails supported by girders resting upon iron columns sunk from eight to twenty-eight feet into the earth (R. Ex. AX, Vol. I, 337). The nature and location of the structure is shown in detail by a map (R. Ex. AX, Vol. IV, 1932) and by numerous photographs (R. Ex. AX, Vol. IV, 1906, 1928).

The first statute looking towards the removal of the spur, passed in 1917 (Laws 1917, c. 788), was purely permissive and required the consent of Manhattan. Manhattan declined to give such consent (126 Misc. p. 883; R. Ex. AX, Vol. IV, 1936), and by Chapter 611 of the Laws of 1919, the 1917 Act was amended by the insertion of a new section providing that, if "no agreement can be reached with the Manhattan Railway Company as to the removal of said tracks, structure, station and appurtenances", the Public Service Commission, on the request of the Board of Estimate and Apportionment of the City, should institute a proceeding and conduct hearings to determine whether these properties "are necessary and convenient for the public service, or whether, even if necessary and convenient, such tracks, structure, station and appurtenances constitute an impediment or obstruction to the public street". Upon the Commission making a certificate that either of these conditions existed, it was provided that the City should have the right to condemn and remove these properties from the street and that the City should then "condemn the rights, easements and franchises of the said Manhattan Railway Company to construct, maintain, operate or use said tracks,

structure, station and appurtenances or any unit or portion thereof".

The certificate of the Public Service Commission, pursuant to the provisions of this statute, was issued on April 22, 1921 (R. Ex. AX, Vol. II, 1096, 1102). The opinion of the Commission is reported in 12 P. S. C. Rep. (1st Dist.) 58. The Board of Estimate and Apportionment then determined to institute condemnation proceedings. It further determined "that no part of the cost and expense of said proceedings * * * shall be borne and paid by the City of New York but that the whole of such cost and expense * * *" should be assessed 65% on the property fronting the spur in East 42nd Street and the remaining 35% on an area of assessment extending from 34th Street to 50th Street and from Fifth to Second Avenues (R. Ex. AX, Vol. I, 88-89).

The Act of 1923 (Laws 1923, c. 635) amended the 1917 and 1919 Acts chiefly by describing the property to be condemned with greater particularity and authorizing the assessments for benefits.

The property condemned included:

(1) The railway structure;

(2) The perpetual franchise to construct and operate the railway which was granted to Manhattan pursuant to the Rapid Transit Act (Laws 1875, c. 606) under which that company was formed, and to its predecessor, the New York Elevated Railway Company, which had been incorporated under the General Railroad Act of 1850 (Laws 1850, c. 140) and which was taken over by Manhattan under a merger agreement in 1881 (R. Ex. AX, Vol. III, 1636); and the right to occupy street space (referred to in this

proceeding as the "public easements") which the franchise carried with it;

(3) The so-called "private easements" acquired from abutting property owners.

The origin of these private easements was as follows: At the time that the elevated railroad lines were constructed it was generally understood that the franchise granted to the companies all of the rights necessary to construct, maintain and operate the elevated railroads, and that abutting property owners would have no right to interfere therewith (*Mayor of New York* v. *Manhattan Railway Co.*, 143 N. Y. 1, 31). In 1882, however, the New York Court of Appeals held in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, that the owners of property abutting on the streets occupied by the elevated structures had easements of light, air and access, which were property within the meaning of the constitution "taken" by the construction of the railroad and which the state was incapable of conveying to the railroad by its franchise. The railroad then proceeded to acquire from the abutters the necessary easements. Some it acquired by purchase, one by condemnation, some by deeds required by the courts to be given upon payment of the adjudicated value of the easements as alternative to injunctions granted in abutters' suits, and some by prescription. All such titles were held to be identical (229 App. Div., p. 624; R. 294). The private easements here in question were so acquired by Manhattan during the years 1888 to 1904 (Ex. BX, R. 319).

The case was first tried in the New York Supreme Court by Mr. Justice O'Malley at an Extraordinary Special Term. A tentative decree was made and filed April 11, 1927, and claimants, the City, and numerous property owners

subject to assessments for benefits, filed objections (R. Ex. AX, Vol. I, 149-233). He found, as had not been disputed, that the spur structure "was suitable for and well adapted to the purposes of an elevated railway" and gave it substantial value, based largely on reproduction cost less depreciation, adopting the City's figure, on this basis, of $120,438 in preference to the claimants' figure of $185,513 (126 Misc. p. 912-913; R. Ex. AX, Vol. IV, 1983, 1984). For the perpetual franchise and public easements which, he held, were "so inseparable in their nature that they must be considered as a single entity", he allowed together the lump sum of $25,000 (126 Misc. pp. 889, 911; R. Ex. AX, Vol. IV, 1980). For the private easements he awarded the lump sum of $750,000, giving consideration to cost, franchise value, depreciation and other elements rather than the present reproduction cost (126 Misc. p. 912, R. Ex. AX, Vol. IV, 1981, 1982). The claimants proved at the trial that, as of the date of condemnation, the market value of the private easements, determined by the difference between the value of the abutting property with and without the easements of light, air and access, was $3,600,000 (R. Ex. AX, Vol. II, 852, 854, 869, 871-872) and that it would have cost the claimants that sum to acquire these easements on that day. The City, as stated by the Court, did not controvert this evidence (126 Misc. p. 912; R. Ex. AX, Vol. IV, 1981). The Court also awarded an undisputed item of $80,000 representing reconstruction costs at Third Avenue necessitated by the removal of the spur. The final decree, entered upon Mr. Justice O'Malley's decision, therefore awarded $975,438 principal, which, with interest, made a total of $1,222,711.53 (R. Ex. AX, Vol. I, 30-31).

Cross appeals were then taken to the Appellate Division, First Department (R. Ex. AX, Vol. I, 5-21) which on

May 9, 1930, reversed this final decree except as to the undisputed item of $80,000. The Appellate Division held that the structure should be valued only as scrap, that the franchise and public easements were of no value, and with respect to the private easements held:

> "We value the rights to impair the light, air and access appurtenant to the property abutting on East 42nd Street at the time of the vesting of title herein upon the basis of the value judicially determined at the time of the original acquisition of these rights."

It remitted the proceedings to the Supreme Court for determination in accordance with this opinion. (229 App. Div. p. 630; R. 305).

The issues thus remitted were first tried before Mr. Justice Mullan, who died after rendering an opinion (141 Misc. 565; R. 331), and preparing a tentative decree, but before filing the final decree. All parties filed objections to the tentative decree (R. 90-172). Upon the retrial Mr. Justice Ingraham, upon the same testimony, exhibits and rulings (R. 182-183), adopted the opinion of Mr. Justice Mullan (143 Misc. 129; R. 341) and made the final decree. The award upon this retrial amounted to $619,352.41 principal, consisting of the undisputed $80,000 item, $235 for the structure valued as scrap, and $539,117.41 for the private easements, valued by a computation hereafter described, "upon the basis of the value judicially determined at the time of the original acquisition" as directed by the Appellate Division. The total award, with interest, was $932,125.38.

Upon cross appeals, again taken by all parties, the Appellate Division, First Department, approved the application of its rule of valuation made by the trial court and

unanimously affirmed the final decree without opinion (228 App. Div. 832; R. 388).

Cross appeals to the Court of Appeals were then taken by all parties both from the final order of the Appellate Division entered March 24, 1933, affirming the final decree on the retrial of the remitted issues, and from its intermediate order dated May 9, 1930 reversing the final decree entered upon the first trial (R. 345-385). The Court of Appeals on July 3, 1934 affirmed the judgment, the majority opinion being written by Chief Judge Pound and Judges Lehman and Hubbs dissenting on an opinion by Judge Lehman (265 N. Y. 170; R. 410).

With respect to the private easements, the method adopted by the courts to carry out the direction of the Appellate Division on the first appeal, that they should be valued "upon the basis of the value judicially determined at the time of the original acquisition of these rights", is set forth in the opinion of Mr. Justice Mullan and was as follows:

There were two blocks involved, one between Lexington and Park Avenues and the other between Lexington and Third Avenues. In each block there were some parcels which had been the subject of judicial determination, resulting in decrees determining the value of the easements taken and directing the abutting property owners to execute conveyances upon payment of the amounts of the awards. The others had been acquired by Manhattan either by settlement with and conveyance from the abutting owners or by prescription (Exs. BX, CX, DX, R. 319-321). The method adopted to compute the value of the easements on each block with respect to parcels as to which there had been no judicial determination was to multiply the front footage

of those parcels by the average front foot value found with respect to the parcels on such block as to which there had been such determinations. The total award for the private easements was then reached by adding to the total amount paid by Manhattan upon the judicial determinations the value, thus computed, of the easements with respect to the remaining parcels as to which there had been no determinations.

The average date of the judicial determinations, which thus controlled the valuation of all these properties, was 1898 (Ex. BX, R. 319). At that time many of the lots in question were vacant and the extraordinary development of these two blocks and the concomitant rise in real estate values there had scarcely begun. Between 1898 and the vesting of title in 1923 there occurred, among other things, the reconstruction of the Grand Central Station and the erection of the Commodore Hotel, the Pershing Square Building, the Bowery Savings Bank Building, the Long Beach Building, and the motor viaduct over 42nd Street and around the Grand Central Station (R. Ex. AX, Vol. II, 823, 845-848).

There was one easement (known in this proceeding as the Depew Place easement) for which no compensation whatever was awarded. At the time the railroad was constructed, the plot to which this easement was appurtenant (having a frontage of fifty feet on 42nd Street) was owned by the New York Central Railroad. In 1885 and before any prescriptive period had run in favor of the Railroad, the City purchased the plot and used it as a public street known as Depew Place. In 1905 the New York Central repurchased this plot and it thereafter remained in that private ownership. Mr. Justice Mullan held (141 Misc. pp. 568-570; R. 333-336) that title to this easement passed to

Manhattan, not from the private owner, but from the City, by virtue of its grant made in 1878 in connection with the franchise, which he held took effect immediately upon the City's acquisition of title in 1885. Despite the fact that at the time of condemnation this was an easement over private property, he held that no value with respect to it could be included in the award.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court and the Court of Appeals erred:

1. In measuring the compensation for the private easements of light, air and access, acquired by Manhattan from the abutting property owners, upon the basis of the value judicially determined at the time of the original acquisition of those rights, rather than at the time of the vesting of title herein, and in ignoring the availability of the property for sale or for other than railroad uses;

2. In awarding no compensation with respect to the private easement in connection with the Depew Place frontage;

3. In awarding for the elevated structure only its scrap value, and in not awarding therefor its structural value based on cost of reproduction less depreciation;

4. In awarding no compensation for the railroad's franchise or its rights thereunder to occupy East 42nd Street.

ARGUMENT

FIRST: THE DECREE OF THE NEW YORK COURT WITH RESPECT TO THE PRIVATE EASEMENTS DENIED THE DUE PROCESS OF LAW REQUIRED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT ARBITRARILY MEASURED COMPENSATION THEREFOR BY THE VALUE OF THE EASEMENTS AT THE TIME OF THEIR ACQUISITION BY THE RAILROAD, RATHER THAN AS OF THE TIME OF THE TAKING, AND IGNORED THE AVAILABILITY OF THIS PROPERTY FOR SALE OR FOR USES FOR OTHER THAN RAILROAD PURPOSES.

The origin of these private easements has been described in the Statement (*supra*, p. 7).

The holding in *Story* v. *New York Elevated R. Co.*, 90 N. Y. 122, *supra*, that the construction of the railroad constituted a "taking" of the abutting owners' easements of light, air and access was necessary to the decision, for the law did not permit recovery for consequential injury to private property caused by operations for public use, but only for its taking for such purpose.

The principles decided in the *Story* case were reaffirmed in *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, where they were summarized as follows (pp. 288-289):

> "*Second.* That abutters upon a public street * * * acquire an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of property situated thereon.

"*Third.* That the ownership of such easement, is an interest in real estate, constituting property within the meaning of that term, as used in the Constitution of the State, and requires compensation to be made therefor, before it can lawfully be taken from its owner, for public use.

"*Fourth.* That the erection of an elevated railroad, the use of which is intended to be permanent, in a public street, and upon which cars are propelled by steam engines, generating gas, steam and smoke, and distributing in the air cinders, dust, ashes and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises, constitutes a taking of the easements, and its appropriation by the railroad corporation, rendering it liable to the abutters for the damages occasioned by such taking."

These principles have become a firmly established rule of property in New York. *Muhlker* v. *New York & Harlem R. Co.*, 197 U. S. 544.

That which the railroad acquired from the abutting owners was, therefore, "an interest in real estate", an "easement". Easements "are created, granted, assigned, extinguished and inherited in the same manner and by the same forms as other real property, and are distinguished therefrom mainly by the fact that they are incorporeal, instead of corporeal property". *Nellis* v. *Munson et al.*, 108 N. Y. 453, 458.

The proceedings taken by the railroad to acquire from the abutters the easements which the Court of Appeals had held requisite to the construction and operation of the road have also been briefly referred to. The opinion of the Appellate Division (229 App. Div. p. 623; R. 292-294), after stating that the parties have treated these rights as

"arising upon conveyances," quoted from a typical sample of the combination grant and release. It included a grant and conveyance from the abutter to the railroad of "all the right, title and interest of the said party of the first part in said East 42nd Street, and the lands forming the bed thereof, and the easements therein, appurtenant to said premises, which are or may be necessary for the construction, maintenance and operation of an elevated railroad in said street, as the same is now constructed, maintained and operated, except as hereinafter stated * * *". (See conveyances, R. Ex. AX, Vol. III, 1646-1717.)

In the courts below the City contended that the "taking" by the railroad of the abutters' easements was by destruction and did not result in the acquisition by the railroad of any property which it could continue to possess. We submit that such a contention is wholly foreclosed by the decisions of the Court of Appeals of New York. Out of the many conflicting expressions which may be found in the opinions of that court regarding the nature of this property, the principles which are controlling here stand established by its holdings in the *Story* and *Lahr* cases, *supra,* and its decisions subsequent to them.

That court held in *Hindley* v. *Manhattan Railway Co.,* 185 N. Y. 335, that the railroad might acquire the easements by prescription. Such a decision negatives the notion that what happened was the "extinguishing" of the abutters' easement, without the transfer of any property right to the railroad. "Prescription rests upon the presumption of a grant * * *." *Scallon* v. *Manhattan Railway Co.,* 185 N. Y. 359, 363. "Where no express grant can be allowed the law will not resort to the fiction of an implied grant so as to create a prescriptive right." *Matter of the*

City of New York (Piers Old Nos. 8-11), 228 N. Y. 140, 145. In the *Hindley* case, *supra*, the Court of Appeals said (p. 354) that

> "* * * the easements were appropriated by the erection of a solid and permanent structure of such huge size as necessarily to be observed by all. For more than twenty years the structure in each stood, proclaiming the open and exclusive possession by the railroads of the easements formerly belonging to the abutting owners."

And again (p. 355):

> "Without leave or license from the plaintiff the defendants took physical possession of his property at the outset, and from that day to this have never let go. The seizure was by building a huge structure of iron in the street, which we have held to be permanent, and have frequently awarded damages on that basis. The defendants grasped the easements of the plaintiff as by an iron hand and never loosened their hold."

These easements in the hands of the railroad company have been taxed as property. *People ex rel. Manhattan Railway Co.* v. *Barker*, 165 N. Y. 305; *People ex rel. Manhattan Railway Co.* v. *Woodbury*, 203 N. Y. 231. In the *Barker* case the Court of Appeals said (pp. 316-317):

> "The rights acquired are the easements of light, air and access of the abutting property owners in the streets occupied by the elevated railroad structure, and when these easements are acquired by the company its structure becomes lawful and its right to operate its road in front of the abutting property unquestioned. (*Messenger* v. *Manhattan R. Co.*, 129 N. Y. 502). The acquirement of these ease-

> ments, it is true, destroys in a measure the value of the abutting property, but to the extent that such value is destroyed, that of the railroad company is increased. We think, therefore, that the fee damages represent property that may be assessed."

Any idea that this holding that the railroad company acquired property was not advisedly reached on full consideration is dispelled by the dissenting opinion of Judge O'Brien therein, which asserted views in all essential respects the same as those upon which the City's contention in the courts below ultimately rests. He argued that what the railroad received in consideration for its payments to the abutters was not property but immunity from suit. Judge O'Brien said (p. 326):

> "The damages which a party is obliged to pay as compensation for an injury to the property of another are, as to the wrongdoer, a total loss. He is compelled to pay, not because he has purchased or acquired any property, but for the reason that he has destroyed that of another."

and again (p. 327):

> "The instrument which the property owner delivered to the relator upon payment of the judgment may for convenience be called a conveyance, or deed, but the name given to it cannot change its real character or its legal effect. It operated simply to release the right of the property owner to bring successive actions in the future against the relator for the continuing injury."

The view thus expressed was rejected by the majority of the Court of Appeals.

Prior to its decision in the *Barker* case the Court of Appeals had held that, in a similar situation, the easement is property transferred to the railroad and that the railroad holds it as an easement. In *Long Island Railroad Co.* v. *Garvey*, 159 N. Y. 334, the court said (p. 338):

> "This right of interference with Mr. Garvey's property, by jarring and shaking his dwelling house, causing smoke to penetrate the rooms occupied by his family, and casting dust, ashes and cinders upon the furniture therein, was in the nature of an easement in his land, as the servient estate, in favor of the land of the railroad company, as the dominant estate. It comes within the definition of an easement, as given by courts and commentators, when they say that it is a permanent privilege that enables the owner of land to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with general ownership. * * * But whether the privilege is an easement, or merely a right in the nature of an easement, the effect of the proceedings in condemnation is to carve out of defendant's property something of value and transfer it to the plaintiff. While the part taken is not easy of description, it can be conveyed as an interest in land, and will enable the plaintiff to carry on its business by using its own property exclusively, instead of using to some extent the property of another."

The opinion from which the above quoted extract is taken was rendered in the condemnation proceeding brought by the railroad to acquire the easement, in the absence of which the court had earlier held in *Garvey* v. *Long Island Railroad Co.*, 159 N. Y. 323, the abutting property owner might enjoin its operation. This situation was thus in all

respects analogous to the elevated railroad cases pursuant to which the Manhattan had been compelled to acquire from the abutting property owners the easements here in question.

As Judge Lehman said in his dissenting opinion in the present case,

> "After the owner has been compelled to pay for the acquisition of these rights because the courts have held that they were property rights, and after such rights have been made subject to taxation by the State because they constitute property rights, it seems to me too late for the State to urge that it may destroy these rights without paying for them the value which the owner could otherwise have obtained as the price of their sale or abandonment." (265 N. Y., pp. 189-190; R. 420).

See *Matter of City of New York* (*Blackwell's Island Bridge*), 198 N. Y. 84, 88.

The Court of Appeals in the present case directed the affirmance of a judgment which, under the instructions of the Appellate Division, measured compensation "upon the basis of the value judicially determined at the time of the original acquisition of these rights". The result has been to fix compensation upon the basis of values at dates remote from the time of the taking. We submit that this constituted a taking of this property without due process of law in violation of the Fourteenth Amendment.

The Federal Constitution requires that in condemnation compensation must be measured by the value of the property at the time of the taking, and not by its cost or its value at the time of the owner's acquisition thereof.

In *Olson* v. *United States,* 292 U. S. 246, this Court referred to its statement of the requirement in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324, of "a full and exact equivalent" for the property as an apt expression of the requirement of both the state and federal constitutions and said (p. 255):

> "That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 306. *Jacobs* v. *United States,* 290 U. S. 13, 17. 2 Lewis, Eminent Domain, 3d ed. § 682, p. 1172. It may be more or less than the owner's investment. * * * It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases,* 230 U. S. 352, 454."

The value of these private easements has always been judicially recognized to be the difference between the value of the abutting property when subject to the railroad's easements and its value when not so subject. *Pappenheim* v. *Metropolitan Elevated Ry. Co.,* 128 N. Y. 436, 449; *Matter of Brooklyn Union Elevated R. Co.,* 113 App. Div. 817, aff'd in 188 N. Y. 553; *Muhlker* v. *New York & Harlem R. Co.,* 197 U. S. 544, 571, *supra.* This was the basis of the opinions of market value given by the undisputed testimony of the railroad's expert at the trial (R. Ex. AX, Vol. I, 852, 854, 870-872). The Appellate Division recognized (229 App. Div. 624; R. 295) that these easements "have been judicially valued as representing the amount which has been taken from the value of the abutting property after allowing for all the benefits received". But the Appellate Division and the Court of Appeals held that this method must be applied to real estate values at the time of

the railroad's acquisition of the property between the years 1888 and 1904, instead of such values at the time of the condemnation in 1923.*

This deprived the railroad of the appreciation, to which it was entitled, in the value of the investment in these easements which was forced upon it by the *Story* and *Lahr* decisions. In *Mayor, etc., of New York* v. *Manhattan Railway Co.*, 143 N. Y. 1, 31, the Court of Appeals said:

> "It is safe to say if at that time the interest of abutting owners had been understood to be as it has been since decided, not a railway would have been built under the provisions of this act of 1875."

The size of the award which is produced by application of 1923 values to the recognized method of valuing such easements arises only from the same circumstances which would have produced large profit from any other form of real estate investment upon these two particular blocks on East 42nd Street, namely, the extraordinary development, prior to the condemnation, of these blocks through the erection of the large buildings above described (*supra*, p. 11). Obviously, on other very large stretches of the elevated system the forced investment in such easements may result in slight, if any, profit. The fact that the application of the proper principle to these two particular blocks would result in a large award is no reason for not applying it.

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*The New York courts' theory that compensation must be determined by conditions existing at the time of the railroad's acquisition of the easements contributed to the anomalous result that no compensation whatever was awarded with respect to the so-called "Depew Place easement". The facts regarding this are set forth in the Statement. The matter is discussed under Point SECOND because the denial of all compensation for this easement was rested chiefly upon the supposed lack of value of the franchise and the public easements which the railroad obtained pursuant to it.

The opinion of the Appellate Division prescribed a single arbitrary standard of value,—that judicially determined at the time of the acquisition of these easements by the railroad between 1888 and 1904. We make no contention that the rule thus prescribed was not correctly applied by Mr. Justice Mullan and Mr. Justice Ingraham at the re-trial. But the effect of it was to preclude any manner of evidence of what these easements were worth in 1923.

The New York courts attempted to justify their decision, valuing the easements "at the time of the vesting of title herein upon the basis of the value judicially determined at the time of the original acquisition of these rights", on the ground that they could only be used in connection with an elevated railroad or a kindred purpose and that the operation of the 42nd Street spur by the railroad had been unprofitable. From these premises the Appellate Division concluded (229 App. Div., p. 628; R. 301) that "We are unable to find that these rights for such a purpose have increased in value over what they were worth when they were acquired". We shall discuss in Point Second the court's assumption that the operation of the spur had been unprofitable. For the sake of the present argument we assume that it is so. Nevertheless we submit that in thus limiting consideration to the railroad's use of the property and ignoring its availability for other uses or for sale, the court also violated the constitutional guaranty. This Court, in *Olson* v. *United States*, said (292 U. S., pp. 255-256):

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which

> it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. *Boom Co.* v. *Patterson*, 98 U. S. 403, 408. *Clark's Ferry Bridge Co.* v. *Public Service Comm'n*, 291 U. S. 227. 2 Lewis, Eminent Domain, 3d ed., §707, p. 1233. 1 Nichols, Eminent Domain, 2d ed., §220, p. 671."

And this Court further there said that its prior decision in *Boom Co.* v. *Patterson*, 98 U. S. 403, cited in the passage above quoted, "is authoritative in state courts in all condemnation cases in which the owner invokes protection of the due process clause of the Fourteenth Amendment" (292 U. S., p. 259). In that case this Court said (98 U. S., p. 408):

> "* * * The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated."

In that case the lands taken were found to be particularly adapted for the formation of booms, and it was held

to be of no consequence that the owner could not have put them to that use without legislative authority.

Among the authorities cited with approval by this Court in the *Boom Company* case, *Goodin* v. *Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169 is especially apposite. There a railroad condemned a perpetual easement for a canal owned by a canal company of which it had stock control. The amount of the award was arrived at by agreement between the two companies, apparently on the basis of a valuation of the property for canal purposes. In a suit by minority stockholders the agreement and award were held not conclusive, the court saying, (p. 181):

> "True, the evidence shows that the property was of little value *as a canal*. As such, in the language of defendants' witnesses, it was 'played out'. It seems to have been as such that it was appraised, upon the interlocutory order of sale, and as such it must have been valued by the two boards of directors, at the time of its sale or *pro forma* condemnation. This was no fair method of estimating the value of the property. The true value of anything is what it is worth when applied to its natural and legitimate uses—its best and most valuable uses."

Again the fact that the stockholders of the canal company could not without further legislative authority have diverted the canal to railroad use was held not determinative.

In *City and South London Ry. Co. and The Rector, etc.* [1903] 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords) the court held that property which had been permanently consecrated and appropriated to spiritual uses should nevertheless be accorded in condemnation full market value based upon its availability for all uses.

See also *Great Falls Mfg. Co.* v. *United States,* 16 Ct. of Claims, 160, 198-199, aff'd in 112 U. S. 645.

There is nothing in this contention which runs counter to the expression of this Court in *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195, (to which the Appellate Division referred, 229 App. Div. p. 628; R. 302) that "the question is what has the owner lost, not what has the taker gained". That case involved a claim of loss "suffered by no one in fact". The claimants there sought to recover more than the value of the property as it stood at the time of condemnation upon the theory that with the "connivance or concurrence" of other property owners a loss "of theoretical creation" could be recovered. In short, there was an attempt to establish a market value which had not existed. *New York* v. *Sage,* 239 U. S. 57; *McGovern* v. *New York,* 229 U. S. 363. The rule of *Boom Co.* v. *Patterson,* 98 U. S. 403, that "the mere mode of occupation does not necessarily limit the right of an owner's recovery" was reaffirmed. In the present case what the owner lost was property which has always been valued in relation to the abutting property. It so happens that the abutting property gains the equivalent. But an award measured by the difference between the value of the abutting property when subject to the railroad's easement and its value when not so subject would be in no sense measuring the compensation by what the taker gained rather than by what the owner lost. It would be the natural method of recognizing availability to the owner for a valuable use. We submit that this was its recognizable fair market value at and prior to the time of condemnation and, it may be added, it was precisely what the railroad would have had to pay in order to acquire the same property at the date of condemnation.

Especially apposite is the case of *In re East Galer Street*, 47 Wash. 603. This was a proceeding to condemn for street widening purposes a strip of land one foot wide which ran between the street and the property of a third party. The City contended that the strip had no value. The owner claimed a value based upon the difference between the third party's property, with frontage on the street, and without it. It was held error for the lower court to have refused instructions in accordance with the owner's contentions. The Court said (pp. 605-606):

> "A tract of land may be of value for but a single purpose; it may be of value to but few persons, and it may have no value, except in connection with other lands owned by other parties. But if it has a value for any purpose, or to any person, or in connection with other lands, a jury will not be warranted in finding that it is without value.
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> * * *
>
> "While the owner of a strip of land like this should not be permitted to take advantage of the necessities of others in fixing its value in a proceeding of this kind, yet, on the other hand, neither a city nor the adjoining owner should be permitted to confiscate his property because of no value in use to him."

We submit that it is the value of this property measured by the difference between the value of the abutting property at the time of the taking when subject to the railroad's easements and its then value when not so subject for which the railroad is entitled to be compensated. The testimony that the market value of these rights upon that basis was $3,600,000 is undisputed.

The majority opinion of the Court of Appeals answered the above contention (265 N. Y. p. 181; R. 413-414) as follows:

> "That these easements would be worth $3,600,000 to the abutting owners if they now owned them is beside the point. What is the City taking from the railroads? That is the question. The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street. It, therefore, acquired no real title to these easements apart from the operation of its road. They otherwise still attach to the property of the abutting owners."

We submit that the Court erred in this conclusion. Of course the railroad could not have released the easements and still have continued to operate. But the railroad could have realized the value of the easements by an agreement made prior to, and as a condition of, the release.

Judge Lehman in his dissenting opinion said (265 N. Y. p. 187; R. 418):

> "It is clear, I think, that if the railway company were not compelled to abandon the structure, the abutting owners would be willing to pay the railway company a very substantial amount for its abandonment with its consequent accretion of great additional value to their land and buildings. That amount would constitute the realizable value of the railroad property to its owner, even if its user for railroad purposes were unprofitable and a burden upon the owner."

This conception of the availability of these easements for sale to the abutting owners was by no means speculative, as the New York courts appear to have supposed; nor does

it infringe the rule that the value to be ascertained does not include "any element resulting subsequently to or because of the taking." (See *Olson* v. *United States*, 292 U. S. p. 256.) On the contrary this availability existed prior to the condemnation and was taken away by the condemnation.

The property owners, no matter how strong their desire was to be rid of the spur, could not have compelled its abandonment. They had no power to condemn. Manhattan, on the other hand, had a perpetual franchise of which it could not be deprived except by condemnation and the payment of fair value for its property.

Section 237 of the New York Railroad Law, which had been in force for years before this condemnation, gave to the railroad the right, by the required corporate action, to make a declaration of abandonment of any portion of its right subject to the approval thereof by the Public Service Commission. This obviously made possible a negotiation with the abutting property owners. It would have been entirely competent for the railroad company to go to the property owners and offer in effect to sell these private easements back to them. The precise procedure would have been that, upon a binding offer by the property owners of the sum of money which, after negotiation, should have been agreed to be the value of these easements, the railroad would file a declaration of abandonment and apply to the Public Service Commission for approval thereof. The views of the public authorities as to the desirability of restoring 42nd Street to unimpeded street uses, as evidenced by the determination of the Public Service Commission herein that the spur was an obstruction to the street, make it reasonably certain that such approval would have been forthcoming. The relatively small num-

ber of abutting owners, and their active desire to secure the removal of the spur, satisfies every requirement of practicability of such a disposition. But the abutters, through the so-called 42nd Street Property Owners' and Merchants' Association, pursued another method and by agitation for the removal of the spur, which they began as early as 1912 (R. Ex. AX, Vol. II, 825-827, 831) turned the legislative power of eminent domain for legitimate public purposes (the removal of obstructions to traffic) to serve their private interests in the acquisition by them of the private easements.

This proceeding in fact was one whereby, at the instance of the abutting property owners, the structure was removed and the easements were restored to them, a part of the cost being imposed upon them.

This situation is clearly recognized in the decision of the Appellate Division, wherein it was said (229 A. D. 617, p. 624; R. 295):

> "If the courts should now determine that these rights should be taken from the railroad and added to the respective properties of the abutting owners without compensation, the courts would be unjustly enriching the property owner at the expense of the railroad. While it is true that this proceeding is one between the city and the railroad, yet as a part of this same statute it is provided that the cost of acquisition of the property taken shall be assessed upon the property benefited."

The Appellate Division further said (229 App. Div. p. 627; R. 299):

> "Looking, therefore, at the result accomplished by the special statute pursuant to which this condemnation is had and the net result accomplished

thereby, namely, that these rights acquired from the property owners are returned to them and extinguished (*Matter of Mayor, etc., of N. Y.*, 186 N. Y. 237, 244), we reach the conclusion that the railroad is entitled to compensation therefor. A contrary result would be unfair to the railroad because it would turn over these rights of property acquired by the railroad on a basis of judicial determination and restore them to the property owners at the expense of the railroad and without payment therefor by the abutting owners."

The plan of the statutes and the action taken thereunder were such as to constitute the abutting owners, or the city as an intermediary, the willing purchaser assumed in determining fair market value.

A negotiated sale was feasible also under the statutes involved herein. The first of these statutes (Laws 1917, c. 788) authorized the Public Service Commission, with the approval of the Board of Estimate and Apportionment, to permit the removal by Manhattan of the spur upon the terms therein described if such terms should be "accepted" by Manhattan. No such acceptance having been given, Chapter 611 of the Laws of 1919 was enacted providing for condemnation.

It appears from the record that before the institution of the condemnation proceedings, the Board of Estimate and Apportionment authorized the President of the Borough of Manhattan to negotiate with the Railway Company for removal (R. Ex. AX, Vol. II, 1087) and that the President of the Borough of Manhattan subsequently reported in detail as to his efforts to reach an agreement with the Railway Company. The value of these easements had a very important part in these negotiations (R. Ex. AX, Vol. II, 1088-1094). The conclusion of the Borough

President was that no agreement could be reached (R. Ex. AX, Vol. II, 1093).

The City then proceeded to condemnation under the Act of 1919 and the amending act of 1923. At any time before the vesting of title as provided by the latter statute it was possible that an agreement might be reached. It is clear that the consummation of the condemnation took away from Manhattan this method of disposing of its property.

There can be no question that the plan of condemnation set forth in the enabling statutes recognized that Manhattan owned the easements and that they were to be taken and paid for. The Act of 1919 provided:

> "Whenever the said board of estimate and apportionment determine it to be necessary or advisable to remove from the street such tracks, structure, station and appurtenances or such unit or portion thereof as shall have been determined by said commission, *the said city shall also condemn* the rights, easements and franchises of the said Manhattan Railway Company to construct, maintain, operate or use said tracks, structure, station and appurtenances or any unit or portion thereof." (Italics ours.)

By the Act of 1923, the statute was further amended not only to carry out the same general plan, but to contain more detailed provisions as to the method of condemnation and also to provide that if the Board of Estimate and Apportionment should deem it in the public interest that "title to said rights, easements, franchises and property should be acquired by the city of New York prior to the entry of the final decree" the said Board might by vote "direct that title

to said rights, easements, franchises and property shall be and become vested in said city upon a specified date and upon the date so specified, said city *shall be and become seized* of said rights, *easements,* franchises and property". (Italics ours.)

Pursuant to the plan thus set up, title vested in the City on December 7, 1923, by the requisite vote of the Board (R. Ex. AX, Vol. 1, 89-94)—the resolution providing that "title in fee to and the right to remove" the structure, etc. "and all rights, easements and franchises of every nature whatsoever * * * shall vest in the City of New York on the 7th day of December 1923".

The City acquired title, pursuant to the statute of 1923, by the resolution above mentioned, and transferred the cost of the acquisition to the property owners. The restoration of the property to the abutting owners constituted the essential justification for imposing the expense upon them. The statutes in question effected exactly the result which was intended, namely, that the properties, including the easements, should be taken, the easements and other benefits restored to the property owners, the cost imposed upon them, and the compensation fixed by the Court, if it could not be arrived at by agreement. This statutory plan was such as to provide for compensation based, as in the case of any other property, on the fair market value between willing seller and willing purchaser at the time of vesting of title. Apart from our argument, above stated, that the easements were prior to the condemnation available for disposition to the abutting property owners, the condemnation statutes themselves contemplated full compensation regardless of limitations, if any, arising from railroad use. *Matter of Ninth Avenue and Fifteenth Street,* 45 N. Y. 729, 732-5; *In re The City and South London Ry. Co. and the Rector,*

etc., [1903] 2 K. B. 728 (Ct. App.); [1905] 1 A. C. 1 (House of Lords).

In the *Ninth Avenue and Fifteenth Street* case, the lands condemned were owned by the City in fee but were held by it only for the purposes of a public park (Prospect Park, Brooklyn), and could not be used for any other purpose without legislative authority. The act under which the condemnation took place provided for the assessment, upon the land benefited thereby, of the damages sustained by the owners of the land taken for the improvement (street widening). The award was made upon the theory that by the effect, although not by the specific provisions, of the act authorizing condemnation, the City was relieved from limitations upon the use and value of the property taken. The assessed property owners appealed on the ground that the owner of the land, because of the alleged limitation to park uses, was entitled only to nominal damages. The Court held that the statute authorizing the condemnation relieved the property of the use limitations and that the awards made upon that theory were correct.

See also *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234.

Whether it be considered that the City took the easements directly for the purpose of what might be termed a resale, or whether it be considered that the City took them in reality as intermediary for the abutting owners, it is certain that the City took this form of property possessed by the Railway Company, which had a clearly available use and a clearly and readily ascertainable market value; and that unless the Railway Company shall be paid for what was thus transferred to the property owners, the result—contrary to the clear intention of the Legislature—will be to do what the law has always prohibited; that is,

to "take the private property of one individual, without his consent, and give it to another." (*N. Y. & Oswego M. R. R. Co.* v. *Van Horn*, 57 N. Y. 473, 477; see also *Matter of Mayor, etc. of New York*, 186 N. Y. 237, 246.)

There is obvious injustice in making peculiar and novel rules of appraisal to fit each particular case; and especially to hand over full value to the abutting property owners but at the same time not to pay full value to the railroad. In fact, the abutting property owners have here obtained full title and the full present value of the easements for only 65% of the cost and expense of the proceeding.

There is nothing in the case of *Heard* v. *City of Brooklyn*, 60 N. Y. 242, relied on by respondents, which justifies denial to petitioners of full value for their property. In that case a railroad which had an easement of right of way purported to deed to the City certain portions thereof for street uses. The railway actually abandoned the railway use, taking up the rails. The court held that the abandonment of the use worked a reversion of the property to the abutting owner. Assuming that abandonment of the railroad in the present case would work a reversion, there was no abandonment. The railroad could not have been compelled to abandon. Such property has no "characteristic of evanescence", as asserted by respondents. A railroad's right of way

> "* * * cannot be appropriated in whole or in part except upon the payment of compensation.
>
> "In other words, it is entitled to the protection of the Constitution, and in the precise manner in which protection is given. It can only be taken by the exercise of the powers of eminent domain, and a condition precedent to the exercise of such power

> is * * * that the statute conferring it make provision for reasonable compensation to the owner of the property taken." *Western Union Tel. Co.* v. *Penn. R. R.*, 195 U. S. 540, 570.

It is too clear for argument that these principles enunciated by this Court would be set at naught if the exercise of the power to take away left, as respondents contend, nothing to be paid for. The easements were taken in perpetuity by the Railroad and paid for on that basis, and there was no diminution of such payment by reason of the possibility of a reverter. *Hudson & Manhattan R. R. Co.* v. *Wendell*, 193 N. Y. 166, 179; *Miner* v. *New York Central & H. R. R. R. Co.*, 123 N. Y. 242. As this Court said in the *Western Union* case, *supra*, of its decision in *New Mexico* v. *United States Trust Co.*, 172 U. S. 171 (p. 570):

> "We there said (p. 183) that if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property.'"

The *Heard* case has nothing to do with the price that must be paid upon the condemnation of such property.

The same fallacious argument of respondents permeates their contention that the determination of the Public Service Commission that the spur was no longer needed in the public service and was an obstruction to the public street *ipso facto* took Manhattan's property or caused it to revert to the abutting owners.

The City would have had no power to condemn the spur except for the enactment of the special enabling statutes above discussed. *Matter of City of New York (Saratoga*

Avenue), 226 N. Y. 128, 135. The determination of the Public Service Commission was made only for the purposes of the statute of 1919, that is, to clear the way for such condemnation.

In their brief in opposition to the petition for certiorari herein the City and property owners repeatedly referred to the determination of the Public Service Commission, and to the failure of Manhattan to appeal therefrom, as if the Commission had made some determination as to value which is *res adjudicata* herein, or at least that the Manhattan, by not seeking to review that determination, had acquiesced in a finding that the spur was of no value.

This contention is utterly without merit. There was no determination by the Public Service Commission of the value in condemnation. That statute authorized condemnation if the Commission should determine *either* that the spur was "no longer necessary and convenient to the public service" *or* that it constituted "an impediment or obstruction to the public use of the street". Since the determination was on both grounds, and the obstruction of the street was indisputable, an attempt on the part of Manhattan to review the Commission's determination would have been futile. Even the Commission's finding that "the spur is no longer necessary and convenient for the public service" was on its face a relative one and mingled with considerations relating to obstruction of the street. The finding was expressly predicated upon the proposition that "The opening up of that great artery of crosstown traffic in Forty-second Street, and sidewalks of the present obstruction, will be of infinitely greater public service than will the continuation of the spur" (12 P. S. C. Rep. 1st Dist. p. 65). The statute expressly provided for condem-

nation, following the Commission's determination, of the "structure", "easements" and "franchise" for which just compensation was to be paid.

The courts below properly rejected respondents' argument based on the *Heard* case and the determination of the Public Service Commission. They properly held that the abutting property owners should not be unjustly enriched by restoring these easements to them without compensation to the railroad. The result of their decision, however, was that property was taken from the railroad and turned over to the abutters which at the time of taking in 1923 was worth $3,600,000 and the railroad was compensated therefor only by what it was worth between 1888 and 1904. This took the railroad's property without due process of law.

As Judge Lehman said in his dissenting opinion (265 N. Y., p. 191; R. 421):

> "The amount fixed by the courts below as the present value of the property rights bears no relation to any value which might be obtained from user of the property, or as the price of its abandonment or transfer. It is purely arbitrary. It may be greater or less than the value. Property is taken without due process of law when the compensation paid is fixed arbitrarily rather than by a determination of the value which might be obtained from user and sale."

SECOND: DUE PROCESS OF LAW WAS DENIED BY THE JUDGMENT THAT ONLY JUNK VALUE SHOULD BE PAID FOR THE RAILWAY STRUCTURE, WHICH HAD BEEN FOUND TO BE SUITABLE AND WELL ADAPTED TO ITS PURPOSE, AND THAT NO COMPENSATION SHOULD BE MADE FOR THE RAILROAD'S FRANCHISE AND RIGHTS IN THE STREET.

The spur was built under a franchise *requiring* connection "with other steam railways or the depots thereof", which included the Grand Central Station. (Laws of 1875, c. 606, Sec. 36 (Rapid Transit Act); *Mayor* v. *Manhattan Railway Co.*, 143 N. Y. 1, 32, 33; R. Ex. AX, Vol. III, 1249, 1325-1326, 1374-1375, 1528.) It was found and not disputed that it was "suitable for and well adapted to the purpose of an elevated railway (126 Misc., p. 913; R. Ex. AX, Vol. IV, 1983).

The questions stated in the above point heading are discussed together because the holding of the New York courts awarding the owner a nominal junk value of $235 for the structure and nothing at all for the franchise, or the rights thereunder to occupy the street, were all predicated almost wholly upon the conclusion of Mr. Justice O'Malley at the first trial that "the claimants have failed to sustain the burden of establishing that the spur, at the time title vested, *when considered by itself*, was profitably operated." (126 Misc. p. 895; R. Ex. AX, Vol. IV, 1955.) (Italics ours.)

The nature of this finding was exaggerated by the Court of Appeals which said (265 N. Y. p. 178; R. 411) that the claimants' demands were large "considering that it was

their *desire* to escape the maintenance and operation of the 42nd Street spur" (italics ours). There is nothing in the record to justify this statement.

In fact, Mr. Justice O'Malley found that the Manhattan consistently opposed the removal of the spur (126 Misc. pp. 883, 885, 899, 914; R. Ex. AX, Vol. IV, 1936, 1939, 1961, 1985); and this was also stated by the Appellate Division (229 App. Div. p. 620; R. 288). The attitude of Manhattan was one of "complete opposition to the removal" (R. Ex. AX, Vol. II, 1089). Even after condemnation had been authorized by the Board of Estimate and Apportionment, the validity of the proceedings was questioned by Manhattan and Interborough at Special Term on the City's application for the order of condemnation (R. Ex. AX, Vol. II, 1110) and on an appeal taken by them from the order of condemnation (208 App. Div. 794).

Mr. Justice O'Malley's finding, above quoted, does not, we submit, support the interpretation placed upon it by the appellate courts. After that statement, Mr. Justice O'Malley proceeded (126 Misc. p. 896; R. Ex. AX, Vol. IV, 1956):

> "But the fact that the spur probably was operated without profit is not conclusive on value. It was an integral part of an elevated railroad system which is shown upon the evidence to be operated on a paying basis. This system is composed of various parts, many of which, if considered separately, might show unprofitable operation. Upon the basis of earning power adopted by the city no doubt it would be possible to show that various portions of the claimants' system, such as specified stations or particular portions of trackage between stations, are operated at a loss. Clearly this should not be

adopted as an absolute or final test. Steam railroads, no doubt, have many spurs and switches which may be maintained and operated at a loss to the companies, yet their maintenance and operation may promote the maintenance and operation of the complete railroad system and thus lend some value to their franchises."

Mr. Justice O'Malley also referred to the possibility that the Manhattan's lease to the Interborough might be terminated (both companies have since gone into receivership), in which event the spur might be of great value to the Manhattan's Third Avenue Line in competition with the Interborough's Lexington Avenue Line, especially as the Manhattan in separate operation would not be limited to a five-cent fare; and held (citing *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 125, 126) that such facts should be taken into consideration with the other circumstances (126 Misc. p. 897; R. Ex. AX, Vol. IV, 1957-1958).

Mr. Justice O'Malley, therefore, citing and following *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84, held that the structure should be given substantial value, based largely on reproduction cost less depreciation; that claimant's experts calculated this amount to be $185,413, and the City's experts $120,438; that the difference resulted largely from the greater depreciation claimed by the City's experts; and that the value given by the City's experts should be adopted (126 Misc. pp. 912-913; R. Ex. AX, Vol. IV, 1983-1984). He held that the franchise had some value and awarded for it, and the perpetual right to occupy 42nd Street, $25,000 (126 Misc. p. 911; R. Ex. AX, Vol. IV, 1980).

The Court of Appeals, while recognizing that the spur was part of a system "operated at a profit", held that "the [Appellate Division's] finding that the Forty-second street franchise had no value should not be disturbed". As to the structures, it held that "The right to have the structure in the street was worthless if the street franchise was terminated. The structures had only a nuisance value when the right to have them in the street ended" (265 N. Y. p. 182; R. 414). But the franchise was terminated only by this very condemnation. It is a strange doctrine that a structure which at the time of condemnation was properly in the street will be given only a nuisance value because by the consummation of the proceeding it became unlawful longer to maintain it.

There has in fact never been any finding that the spur was an unprofitable venture, except in the limited sense above quoted. It has been found that the spur produced an operating loss; but equally it has been found that the spur was a part of a system operated at a profit. Even considered by itself, the spur was no inconsiderable property. When taken, it daily accommodated an average of between 12,000 and 13,000 passengers on the basis of counts taken by the City and the claimants (R. Ex. AX, Vol. I, 572, 573, Vol. II, 580, 787). Its use was then increasing (126 Misc. p. 891, R. Ex. AX, Vol. I, 539-541) and was then greater than in many earlier years. Its traffic had been subject to fluctuation due to the effects of subway competition. Prior to 1904 the passenger traffic had been rising. In that year it fell off sharply because of the opening of the first subway. But after 1912 traffic rose until 1918, when the Lexington Avenue subway north of Grand Central was put in operation. The spur traffic then declined again, but again turned upward before the present condemnation

(126 Misc. pp. 890-892; R. Ex. AX, Vol. IV, 1947-1950; Vol. I, 324-325, 544-545; Ex. K-7 in Ex. AX, Vol. IV, 1922). Mr. Justice O'Malley found that by 1923 the subway stations at Grand Central and Times Square had practically reached the point of saturation (126 Misc. 892, R. Ex. AX, Vol. IV, 1950, 1951).

The dangerous congestion of 42nd Street required a determination by the Public Service Commission that public convenience and necessity would be served by the removal of the spur; but property devoted to public convenience under a franchise requirement and adequately serving its required function cannot be confiscated by an award of no value, or "junk value".

The protection against confiscation by eminent domain of the whole category of properties not profitable in and of themselves, but provided under franchise requirements by railway and other public service corporations in response to public demand, is involved in the determination of the New York courts in this case that the structure, franchise and public easements may be taken in this proceeding without substantial compensation.

Facilities which promote public convenience, like transfer and terminal facilities, as well as those which promote public safety, like signal equipment and non-grade crossings, which only to a limited degree contribute to profit, are in increasing measure being provided under legislative and commission requirements. Capital costs which have regard to public welfare as distinct from profit have become more and more generally obligatory. To take such property without compensation would penalize its provision as compared with that of facilities which subserve purely private profit.

1. The Structure.

Where, as in the present case, the structure is found to be suitable and well adapted for its purpose, and used as part of a plant, so-called structural value, or the cost of reproduction less depreciation, is an important element which must be taken into consideration in ascertaining its value in condemnation. *Matter of City of New York (Blackwell's Island Bridge)*, 198 N. Y. 84; *New York Telephone Co.* v. *State*, 169 App. Div. 310, 323, aff'd 218 N. Y. 738. In the case of *United States* v. *Boston, Cape Cod & N. Y. Canal Co.*, 271 Fed. 877 (C. C. A. 1st), relied on below by respondents, the decision turned on the fact that at the time of condemnation construction prices were abnormal, due to the War (p. 889). Where the property is a profitable concern, it may be given a going value *in addition*. *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202-203; *National Water Works Co.* v. *Kansas City*, 62 Fed. 853, 865, (C. C. A. 8th Circuit; Brewer, Sanborn & Thayer, *J.J.*). It has been held that the elevated structures erected under the Manhattan franchise cannot be taken without just compensation. *Manhattan Railway Co.* v. *Mayor*, 89 Hun. 429, 431.

Mr. Justice O'Malley's decision that claimants "are entitled to substantial damages on account of the taking of their physical structure, and that this value must be based largely upon the structural value" (126 Misc. p. 913; R. Ex. AX, Vol. IV, 1984) should not have been disturbed. He held that "structural value is not conclusive, but is some evidence of value". The figure which he adopted was based on the City's evidence and was the lowest estimate of substantial damage in the record, although the City contended then, as now, that only junk value should be given.

We have seen no decision which holds that, where property taken is part of a profitable system, constitutional

protection against confiscation is to be denied because the particular part taken produces an operating loss. Such a principle would be disastrous if applied, for example, to bridges on an unprofitable part of a profitable railroad system. As an example to the contrary, see *Matter of Mayor*, 39 App. Div. 589, wherein a reserve gas plant, which had not been in use for several years but had been kept up, was valued in condemnation as a going plant, although obviously its ownership must have produced, taken by itself, operating loss rather than profit.

The structure when taken was real estate. *People ex rel. New York Elevated R. Co.* v. *Commissioners*, 82 N. Y. 459, 462; *Manhattan Ry. Co.* v. *Mayor*, 89 Hun. 429, 431. It was error to value it as detached junked personalty. *Denver* v. *Denver Union Water Works Co.*, 246 U. S. 178, 191. The City takes, and must pay for, annexed property "as it then exists",—that is, as realty. *Matter of City of New York* (*Allen Street*), 256 N. Y. 236, 241. In *Jackson* v. *State*, 213 N. Y. 34, the court reversed an award for fixtures because they had been valued not as real estate but as "second-hand articles" severed from the warehouse. The court, per Cardozo, *J.*, said that such a valuation was "intolerable". In effect, the valuation herein was not as of the time of taking but as of a subsequent date,—that is, after removal,—contrary to the established rule which is inherent in due process (*Olson* v. *United States*, 292 U. S. 246, 255).

2. The Franchise.

The franchise consisted of grants from the State and City and had its source in the Rapid Transit Act (Laws 1875, c. 606). It has been held that this must be construed as a "grant made by the State upon consideration". *Mayor*,

etc., of New York v. *Manhattan Railway Co.*, 143 N. Y. 1, 31, 32. The acceptance of the franchise and the building of the spur structure under its requirement constituted a contract between the State and the railroad which was property protected by the constitution. *Los Angeles* v. *Los Angeles Gas & Electric Corp.*, 251 U. S. 32; *New York Telephone Co.* v. *State*, 169 App. Div. 310, aff'd 218 N. Y. 738. In *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544, 555, 556, this Court held that an attempt to terminate a part of a franchise by reason of traffic congestion was a violation of the contract clause of the federal constitution.

A franchise "can no more be taken without compensation than can * * * tangible corporeal property". *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 329. We repeat that just compensation may not be measured by regarding only the income produced by the spur considered by itself. It was an integral part of the profitably operated Third Avenue Line. The elements of value, actual and potential, which Mr. Justice O'Malley found that it possessed required that some substantial value be awarded for its taking.

3. The Public Easements.

While the Manhattan's right to occupy space in the public street was vested in it under the franchise, it was distinct from the franchise to operate the railway.

The City's grant under the franchise purported to convey all the interest in the street requisite to permit the railroad to build its structure and operate its trains. As above pointed out, only the conclusion of the Court of Appeals, that the private easements of light, air and access were owned by the abutters and not controlled by the City,

prevented them from passing also. *Herzog* v. *New York Elevated R. Co.*, 14 N. Y. Supp. 296, 297, 298, affirmed in 76 Hun, 486, the opinion below being specifically approved, and affirmed on opinion below, 151 N. Y. 665. The railroad under the City's grant therefore acquired, as against the City, the right to occupy with its columns, station approaches and so forth, valuable street space. It "obtained an interest in and to a certain extent a title to the street for the purpose of construction and operation of its railroad, which was in the nature of property". *White* v. *Manhattan Railway Co.*, 139 N. Y. 19, 26. Since the City's grant was duly made with legislative authority, "it amounted also to an immediate grant of an interest, and, it would seem, of a freehold interest in the soil of the streets". See *Milhau* v. *Sharp*, 27 N. Y. 611, 620. Such a right has been held to be a "perpetual and indefeasible interest in the land constituting the streets". *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513. It has also been held that neither the police power nor any implied reservation by which a railway is sometimes required to make alterations for the public benefit would justify a requirement that such structures should be removed, or even changed, without compensation. *Manhattan Railway Co.* v. *The Mayor*, 89 Hun, 429.

Whether these public easements were of so distinct a nature that they should have been separately valued, or were, as the lower courts have held, so inseparable from the franchise that it and they must be considered as a single entity, they could not, we submit, be taken wholly without compensation. The City has established a schedule of charges which it levies upon persons who procure from it licenses to construct and maintain overhead structures, passageways and the like in the space over streets (Ex. W, R. Ex. AX, Vol. III, 1760). Claimants' expert, on the ba-

sis of this and other methods of appraising similar interests in public streets, testified that the value of these public easements was $300,000 as a minimum value (R. Ex. AX, Vol. II, 1026-1028). This was the only evidence of value in the record, the City limiting its position to the contention of law that no value should be awarded.

4. The Depew Place Easement.

It was the opinion of the Appellate Division, that the public easements and the franchise were inseparable and that the franchise was without value, which chiefly influenced Mr. Justice Mullan's holding on the re-trial that no compensation whatever should be awarded for the so-called Depew Place easement.

At the time of the condemnation this was no different in character or in its elements of value from the other private easements taken. It was an easement with respect to property which was then and had since 1905 been in the private ownership of the New York Central Railroad Company. But even the limited measure of compensation which was made for the other private easements was denied as to it, solely because of the time and manner of its acquisition. While the abutting property in question had been in private ownership at the time of the construction of the spur in 1878, the railroad did not acquire the easements with respect to it before the abutting property was purchased by the City in 1885. Mr. Justice Mullan held (141 Misc. pp. 568-569; R. 333-334) that at that instant the City's grant to the railroad pursuant to the franchise took effect (*Herzog* v. *Manhattan Railway Co.*, 14 N. Y. Supp. 296, 76 Hun, 486, 151 N. Y. 665, *supra*; see also *Mayor of the City of New York* v. *Manhattan Railway Co.*, 143 N. Y. 1, 30; *Hindley* v. *Manhattan Railway Co.*, 185 N. Y. 335, 355).

Mr. Justice Mullan's conclusion was that, since the easement with respect to Depew Place was acquired from the City rather than from a private abutting owner, it was in no different class from the public easements to encumber East 42nd Street; and that, as the Appellate Division had ruled that the franchise and right to occupy the street were no value, it followed that these rights had no value. He confessed (141 Misc. p. 570; R. 336) that this ruling "seems to create an anomaly", but said "that the anomaly is inherent in the nature of the right against the City". We suggest that the anomaly was created only by the incorrect rulings of the Appellate Division, first, that conditions at the time of acquisition of the easement by the railroad, rather than at the time of taking, should control, and, second, that because the franchise was held to be without value all interests in real property which were granted pursuant to it were likewise without value.

If the New York courts were to be upheld in their decision denying any compensation whatever for the Depew Place easement and the public easements, it would have to be upon the ground that those properties themselves were worthless, and not upon the ground that the franchise to operate the spur was worthless.

The Depew Place easement is included in the calculation of $3,600,000, which with interest is asserted by the claimants to be the proper measure of compensation for all private easements. If, however, the judgments below should be allowed to stand with respect to the private easements in general, there should be added to the award therefor the value of the Depew Place easement according to the rule of valuation applied by the New York Courts in the amount of $29,157.48 (141 Misc. p. 569; R. 335).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE MODIFIED IN ACCORDANCE WITH THE PRINCIPLES URGED HEREIN.

Dated, March, 1935.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 546—October Term, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

against

THE CITY OF NEW YORK, *et als.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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December 20, 1934.



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Reported below:

265 N. Y. 170, 192 N. E. 188.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of Facts.

Petitioners' statement of facts is substantially correct, except for the emphasis which they put on the phrase "taking of property", such as the *taking* of the physical structure, the *taking* of the franchise and the *taking* of the easements for light, air and access. In view of this overemphasis, it is appropriate to restate some of the essential facts.

Pursuant to the provisions of L. 1919, c. 611, as amended by L. 1923, c. 635, "the Public Service Commission determined that the spur was no longer necessary or convenient for the public service and that it constituted an impediment and obstruction to the public use of the street" (R. 410, 411, 265 N. Y. 170, at p. 178).* In that proceeding, the Com-

* For the opinion of the Public Service Commission see 12 P. S. C. Rep. (1st Dist.) 58. An excerpt from this opinion will be found in the Appendix, *post*, p. 17.

mission also found that "the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street, caused by the development of that section, and it is securing it without any assistance whatever from the spur, where traffic is actually on the decline" (Opinion of Commission, quoted in Appendix, *post*, p. 18). In addition, the Court found that the removal of the spur would actually result in a benefit to the petitioners herein (R. 414, 265 N. Y., at p. 182), and that "it was their desire to escape the maintenance and operation of the Forty-second street Spur" (R. 411, 265 N. Y., at p. 178).

This determination of the Public Service Commission, which antedated the condemnation proceedings, the Manhattan Railway Company, owner of the spur, made no effort to have reviewed, although under State law a writ, or order, of certiorari to the Appellate Division of the Supreme Court was a readily available and adequate remedy. See Code of Civil Procedure, §§ 2120 *et seq.*, the statute in force in 1921; and see *People ex rel. New York & Queens Gas Co.* v. *McCall*, 219 N. Y. 84, 89 (1916), aff'd 245 U. S. 345 (1918).

It was thus a structure already moribund (by virtue of the Public Service Commission's determination) which the City of New York proceeded to condemn.

Jurisdiction.

Petitioners invoke the jurisdiction of this Court under § 237 of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 937; U. S. Code of Laws, Tit. 28, § 344). Since this is a petition to review the decision of a state court, it must appear that the petition presents a

substantial federal question, and that the judgment of the Court below is not sustainable on a non-federal ground. *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54 (1934), *post*, p. 10.

The opinion of the Court below does not indicate whether it held that petitioners were entitled to an award under the due process clause of the Fourteenth Amendment or whether, aside from the question of just compensation under the Fourteenth Amendment, the petitioners were held entitled to the award *ex aequo et bono* under the state law. In this case, as in *Lynch* v. *New York ex rel. Pierson*, *supra*, the basis of the decision is left to conjecture. Therefore, we submit, this Court is without jurisdiction.

Respondents will show, however, that petitioners have no claim of right under the Fourteenth Amendment, because, upon the facts found by the Courts below, they were awarded more than they would have been entitled to under the Fourteenth Amendment. As the Court below said (R. 413, 265 N. Y., at p. 181):

> "the decision of the court below awards the railroads fair compensation."

Outline of Argument.

I. The decision of the Public Service Commission and the concurrent findings of the Courts below have eliminated from the case all questions concerning the valuation of the franchise and of the physical structure.

II. The easements, under State law, had no independent existence, and therefore no value, apart from the franchise and the physical structure; hence they were

overvalued rather than undervalued by the Court below.

III. The adequacy of the amount awarded by the Court below, in the interest of substantial justice, for easements whose existence terminated with the railway company's franchise, raises no substantial federal question.

POINT I.

The decision of the Public Service Commission and the concurrent findings of the Courts below have eliminated from the case all questions concerning the valuation of the franchise and of the physical structure.

The franchise—the right to be in a public street—had no value; and this was the finding of fact concurrently made by both the lower State courts whose decisions were affirmed by the Court of Appeals.

The Appellate Division, on an appeal which resulted in an award of a new trial, said of this franchise (229 N. Y. App. Div. 617, at p. 621, as paraphrased in R. 414, 265 N. Y. 170, 182):

> "The franchise to build, maintain and operate the spur is of no value, since the spur can no longer be operated except at an annual loss and the taking by the city is a distinct benefit to the claimants since the Public Service Commission has determined that the spur is no longer necessary and convenient for public service."

And when the case, after a new trial and affirmance by the Appellate Division (238 N. Y. App. Div. 832) finally

reached the Court of Appeals, the latter Court, in making the decision now sought to be reviewed, said (R. 414, 265 N. Y. at p. 182):

> "• • • the finding that the Forty-second street franchise had no value should not be disturbed. • • •"

This mode of valuing a franchise by earnings is in accord with the accepted practice. *People ex rel. Jamaica Water Supply Co.* v. *Tax Com'rs*, 196 N. Y. 39, 55 (1909); *Montgomery County* v. *Schuylkill Bridge Co.*, 110 Pa. St. 54, 59 (1885). And the foregoing quotations from the opinions below are a sufficient answer to the belated and hopeless attempt of Petitioners (Brief, p. 17) to assign a positive earning power to the spur in question.

As a further consequence of the worthlessness of the franchise (and the Public Service Commission's determination, which the railway company failed to have reviewed), the Court of Appeals held (R. 414-415, 265 N. Y., at pp. 182-183):

> "The Appellate Division held that junk value was all that should be allowed; nuisance value or what the illegal structure was worth when taken down. The right to have the structure in the street was worthless if the street franchise was terminated. The structures had only a nuisance value when the right to have them in the street ended.
>
> "On the whole, a fair valuation of the property taken is the amount awarded by the Appellate Division."

It is, therefore, impossible to find any federal question arising out of the judgment below insofar as it affects either the franchise or the physical structure.

POINT II.

The easements, under State law, had no independent existence, and therefore no value, apart from the franchise and the physical structure; hence they were overvalued rather than undervalued by the Court below.

We now come to the only remaining question in the case, *i. e.*, did the Court below properly compensate the railway company for the so-called easements which, under the ruling in *Story* v. *New York Elevated Ry. Co.*, 90 N. Y. 122 (1882), it was compelled to "acquire" (in 1888-1904) from the abutting property owners as a condition precedent to the lawful operation of its elevated railway under its franchise?

It is, we may remark in passing, a little difficult to understand just how a railway company may be said to "acquire" an abutting owner's easements of light, air and access when it compensates such owner for the damages the operation of the railroad in front of his property causes him. It would seem more accurate to say that the railway company has acquired rights to impair easements; and such, in effect, was the holding below, the Court saying (R. 412, 265 N. Y., at p. 180):

> "Quite apart from the discussion of the cases, it is clear that the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property. The railroad as such possesses a right to impair the easements by the operation of its road. If it did not have such rights it would be guilty of an injury to the inheritance."

It is important to note that, howsoever we may describe it, the acquisition was for the purpose of rendering lawful the operation of its elevated railroad and for no other purpose.

Under State law an easement, or similar *jus in re aliena*, acquired for a particular purpose generally ceases and determines, and may be said to revert to the owner of the land across which the easement has been acquired, whenever the use to which the easement was a *sine qua non* ceases.*

An express decision to this effect is *Heard* v. *City of Brooklyn*, 60 N. Y. 242 (1875). Here a railroad company had obtained from the legislature authority to appropriate lands for railroad purposes, and in exercise thereof had acquired a strip of land adjoining a certain avenue. Subsequently the defendant decided to widen the avenue, and received from the railroad a deed to so much of its right of way, stripped of the tracks, as was needed to bring the avenue to the desired width. The plaintiff, as successor in interest to the parties from whom the railroad had secured its right of way, brought ejectment; and the Court of Appeals held that the complaint stated a good cause of action. A judgment of dismissal was accordingly reversed, and a new trial ordered.

The Court pointed out (p. 246) that the railroad in exercising its statutory powers "became entitled only to the use of the land for the purpose of operating its railroad. The fee remained in the original owners, subject only to that use, and on the discontinuance of the use, the owners were entitled to resume possession of the land." This reversionary interest arises whenever (p. 247) "land has

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* See also *post*, p. 12.

been taken for a particular use only, and that use is discontinued and abandoned."*

The logic of this decision seems unanswerable. It has stood unchallenged for nearly sixty years. *It antedated the acquirement of the easements in the case at bar.* And we know of nothing in the Federal Constitution which permits one who has acquired a piece of property, with this well-defined characteristic of evanescence, to reject the essence of his purchase and argue that he bought something entirely different.

This being the law of New York, it follows that the compensable loss of the railway company was *overestimated* rather than *underestimated* by the Courts below.

The force of the *Heard* decision was perceived by the Court below, for they said (R. 413-414, 265 N. Y., at p. 181):

> "That these easements would be worth $3,600,000 to the abutting owners if they now owned them is beside the point. What is the city taking from the railroads? That is the question."

In so analyzing the case, the Court below was merely following in the footsteps of Mr. Justice Holmes, who in speaking for this Court in *Boston Chamber of Commerce* v. *City of Boston*, 217 U. S. 189 (1910), said (p. 195):

> "And the question is what has the owner lost, not what has the taker gained."

---

* The powers of the railway company in the case at bar to acquire property are couched in language (L. 1875, c. 606, § 17) substantially similar to that used in the statute before the Court in the *Heard* case.

POINT III.

The adequacy of the amount awarded by the Court below, in the interest of substantial justice, for easements whose existence terminated with the railway company's franchise, raises no substantial federal question.

(1)

Apparently Chief Judge POUND, though conceding in his Opinion that the City's argument that the easements were not compensable at all "has some logical force" (R. 413, 265 N. Y., at p. 181), nevertheless felt, under the pressure of intuition as opposed to logic (if we may so express it without disrespect)*, that the "substantial justice" which the Court of Appeals has statutory power to administer (Civil Practice Act, § 588) required compensation in some measure to be paid. He accordingly declared (R. 413, 265 N. Y., at p. 181):

> "• • • the city should reimburse the railroads for what it cost them to acquire such easements when it terminates the right of use in perpetuity."

The learned Judge did not spell out the source of the duty behind the phrase "should reimburse". As we pointed out *ante*, p. 7, in citing *Heard* v. *City of Brooklyn*, the duty positively did not exist,—on strictly legal considerations. The railroad bought an evanescent kind of property, as it well knew. That which precipitated and completed the

* See *The Judgment Intuitive*, 14 Cornell L. Q. 274 (1929), by Hon. Joseph C. Hutcheson, Jr., one of the judges of the Circuit Court of Appeals for the Fifth Circuit.

process of evanescence was a determination of the Public Service Commission, which the railway company elected not to review but to accept.

Nevertheless Chief Judge POUND thought that *ex aequo et bono* the City should pay something. That duty might have had any one of five sources: (1) the State Constitution, (2) State statutes, (3) an implied contract, (4) general principles of equity and natural justice, or (5) the Federal Constitution.*

As recently as November 5, 1934, this Court said, in *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. • • • Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. • • • "

---

* It would seem that the prevention of an unjust enrichment is what POUND, Ch. J., had in mind when he ordered that the railway company be paid for the easements. The property owners received compensation for damages to their easements of light, air and access commencing in 1877, and after 46 years their easements were restored to them in their pristine, unimpaired condition. But their enrichment is microscopic, for the impairment lasted 46 years. The abutters in that period may be said to have "earned" what was paid them.

It would seem clear, therefore, that when the Court below created this duty and adopted a device for measuring it, it imported no federal question into the case.

(2)

A few words should be addressed before closing to some specific features of the Petition for Certiorari.

The dissenting opinion of Judge LEHMAN is accorded, as it seems to us, undue prominence. The impression is apparently sought to be created that the majority categorically denied every proposition that the minority laid down. Obviously this is not so. The two opinions are contrary, not contradictory, and pursued such different courses that neither one can be said to be a refutation of the other.

Stress is laid (Brief, p. 13) on the requirement of the Court below that the City pay the railway company on the basis of the "cost" of the easements, as opposed to their value at date of taking. But the processes attending the termination of a franchise under State law (as set in motion by a determination of the Public Service Commission not sought to be reviewed by anyone aggrieved), and the evidence in the case, are such that the value at taking is less than cost. The alleged error, therefore, is an instance of *injuria sine damno*, and has in fact given the railway company more than it was entitled to.*

This disposes of the argument based on the language of *Olson* v. *United States*, 292 U. S. 246, 255 (1934) that "it is the property and not the cost of it that is safeguarded by state and federal constitutions".

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* The cost, judicially determined by the Trial Court, in an order which was affirmed by the decision under review, was $194,942.24 (R. 319); the award was $539,117.41 (R. 340), plus ten years' interest.

In the last cited case this Court went on to say (p. 255):

> "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

But no option, no range of choice, is or ever was available to the railway company. Its presence in the street was sanctioned for one purpose only, the maintenance of an elevated railroad. That right was defeasible by appropriate action, taken pursuant to law, by the Public Service Commission. The company's easements were never assignable in gross. It could not have erected stores or dwellings upon its structure, nor conveyed to anyone the right to do so. Hence the dissenting Judge erred when he attributed to the easements "the value which the owner could otherwise have obtained as the price of their sale or abandonment". (R. 422, 265 N. Y., at p. 191.)

The petitioners say (Brief, pp. 15-16):

> "This conception of the availability of these easements for use by the abutting owners and the possibility of sale thereof to them was by no means speculative, as the New York courts appear to have supposed; * * *."

We have already indicated the two answers to this contention. One is that the easements were never assignable in gross. The other is that, under the rule in *Heard* v. *City*

of Brooklyn, supra, p. 7, the easements reverted to the abutting owners, and their character as railway property vanished when the railroad ceased to operate.

The Petitioners (Brief, p. 19) challenge Chief Judge POUND's statement that the 42nd Street spur franchise had no value. Whether it was earning a profit or not is, however, more of a question of fact than of law; and if a question of law at all, it is a question of State law and is not a federal question.

The Petitioners (*ibid.*) argue that the railroad franchise "when accepted and acted upon, was an entire contract, not a collection of parts". But the essential nature of a franchise conferred by State law, its divisibility *vel non*,—these are exclusively questions of State law.

The same is true of the arguments (Brief, pp. 5-6) based on the failure to compensate for the easements in front of the intersection of Depew Place. The Courts below, on principles which the Brief itself shows were based on State law alone, held this particular easement (*a*) cost the railway nothing and (*b*) was part of the franchise to be in the street, a franchise determined by competent authority in April, 1921, to be valueless.

If, as Petitioners maintain (Brief, p. 20), it "was error to value it [the spur] as detached junked personalty", we again reply that no federal question is presented; for the spur acquired that character by virtue of the determination of the Public Service Commission, and if that determination aggrieved the railway company, its remedy was to review the determination in the Appellate Dvision of the Supreme Court, on writ or order of certiorari, pursuant to law. This it did not do.

(3)

Taking the Petition as a whole, however, and construing its equivocal portions most favorably to the Petitioners, we find therein, in the last analysis, nothing more than a question of the *quantum* of compensation. A fitting answer to the Petitioners' contentions is therefore found in *McGovern* v. *City of New York*, 229 U. S. 363 (1913), where the owner's claim that an award in condemnation was so inadequate as to violate his constitutional rights was rejected by this Court in the following pronouncement (pp. 370-371):

> "The statute requires the Commissioners to determine 'the just and equitable compensation which ought to be made'. If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought and in that sense is deprived of his property can come to this court. The result of a judgment in trover, at least if satisfied (*Lovejoy* v. *Murray*, 3 Wall. 1; *Miller* v. *Hyde*, 161 Massachusetts, 472), is to pass property as effectually as condemnation proceedings—yet no one would contend that a plaintiff could come here under the Constitution simply because of an honest mistake to his disadvantage in laying down the rule of damages for conversion. If the plaintiff could bring such a case to this court, one might ask why not the defendant for a mistake in the opposite direction that will deprive him of money that he is entitled to keep.
>
> "When property is taken by eminent domain it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can

make out that the State has deprived him of his property unconstitutionally. *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 575, 576. As it is put in the case most frequently cited in favor of the right to a writ of error, 'we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation'. And again the final judgment of a state court 'ought not to be held in violation of the due process of law enjoined by the Fourteenth Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation'. *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226, 246, 247; *Appleby* v. *Buffalo*, 221 U. S. 524, 531, 532."

In *Appleby* v. *City of Buffalo*, 221 U. S. 524 (1911), this Court (per Day, J.) said (p. 532):

"The only assignment of error which is here open for review does not show that the court below, by any ruling of law, deprived the owner of the right of compensation for his property. The alleged denial of Federal right rests upon the assertion that the damages were nominal, while the property taken was of greater value. But, as this court has heretofore held, if the State has provided adequate machinery for the ascertainment of compensation, upon notice and hearing, and the record discloses no ruling of law which prevented compensation to the owner for the property taken, there is no lack of due process."

The writ of certiorari should be denied for want of a substantial federal question.

Dated, December 20, 1934.

Respectfully submitted,

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APPENDIX.

Excerpt from opinion of New York Public Service Commission, First District, in *Matter of Manhattan Ry. Co. (Removal of 42nd street Spur)*, 12 P. S. C. Rep. (1st Dist.) 58, at pages 68-69 (1921):

> "The defense of the Manhattan Railway Company proceeds chiefly upon two grounds:
>
> (1) That the spur will serve as a feeder to help the Third Avenue Elevated Railroad to secure part of the constantly increasing traffic in the Forty-second Street district; and (2) that in case of the cancellation of the existing lease of the Elevated Road to the Interborough Rapid Transit Company (which now operates the Elevated Road), and the resumption of operation of the Elevated Road by the Manhattan Railway Company, the latter company would lose its connection with Grand Central Terminal, and would thereby lose its share of the traffic to and from that Terminal.
>
> I do not think that either of these contentions can be sustained.
>
> In the first place, the record shows that although the Third Avenue Elevated Road is receiving direct benefit in traffic increase from the tremendous growth of the Forty-second Street District, nevertheless traffic on the spur is actually decreasing.
>
> In other words, ticket sales at Forty-second Street station of the Third Avenue line were—
>
> in 1916 2,303,728
> in 1920 3,339,140
>
> or an increase of more than a million.
>
> While, during the same period, ticket sales on the spur were—
>
> in 1916 1,537,904
> in 1920 1,524,427

During this same period, the record shows that ticket sales at other stations of the Third Avenue line (such as 14th Street and 23rd Street) were practically stationary.

The conclusion to be drawn from the above is that the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street caused by the development of that section, and it is securing it without any assistance whatever from the spur, where traffic is actually on the decline.

In the second place, the record shows that if this spur were removed, there would be a tremendous increase in building operations extending as far east on Forty-second Street as Third Avenue; that this would result in bringing many more people to that section, many of whom would for convenience use the Third Avenue line, and would supply a profitable short haul traffic. That the constant flow of people from these buildings to the Third Avenue line would turn much additional traffic in that direction is obvious. Accordingly, even if the lease of the elevated road to the Interborough Rapid Transit Company were to be cancelled (which seems to be a remote possibility), the removal of this spur would not cut the company off from the Forty-second Street district and would not deprive the company of its share of traffic from that district, but rather would extend that district so as to embrace Third Avenue, with much resultant benefit to the Third Avenue Elevated Railroad."

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Reported below:
265 N. Y. 170, 192 N. E. 188.

Certiorari granted:
293 U. S. 554.

IN THE

Supreme Court of the United States

No. 546—October Term, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

against

THE CITY OF NEW YORK, *et als.*,

Respondents.

BRIEF FOR THE CITY OF NEW YORK, RESPONDENT.

[The abbreviation "R." refers to the fifth volume of the Record. The abbreviation "AX." refers to the other four volumes, which, being the record of a former trial, were introduced in evidence and marked Exhibit A-X at the second trial—the trial which terminated in the order and judgment now before this Court.]

Preliminary Statement.

The respondents before this Court consist of (1) the City of New York, and (2) groups of property owners in a defined area of assessment who are obligated by statute to defray the cost of the improvement effected by the condemnation and removal of the 42nd Street Spur. All of the respondents are equally interested in sustaining the order and judgment under review.

By arrangement between counsel for the various respondents, the scope of the briefs will conform approxi-

2. Nothing for the easement in respect of a portion of open frontage—the width of a certain street called Depew Place;

3. $235 for the elevated structure itself, being the scrap value of the iron, etc., composing it;

4. Nothing for the franchise and right to occupy 42nd Street.

The petitioners appear to assert, in reference to these four items, that (1) the compensation for the easements was arbitrarily measured by the value of the easements at the time of their acquisition by the railroad, rather than by the value at the time of condemnation; (2) though the Depew Place easement cost the railroad nothing because the frontage it represents was in City ownership in 1885, yet compensation should be paid because the frontage was in private ownership at date of condemnation; (3) the physical structure should have been compensated for on the basis of cost of reproduction less depreciation; and (4) the franchise and right to be in the street had a substantial value because the spur was part of a profitable system.

Whether in rejecting these contentions the Courts below transgressed constitutional limitations depends to no small degree on factual considerations, and it will be the burden of respondents' briefs, and particularly of this brief, to show that, whatever their *a priori* merit, the petitioners cannot prevail in the face of certain undisputed facts which place the 42nd Street Spur in a class by itself.

The Opinion of the Public Service Commission.

Upon the conclusion of the hearings before the Public Service Commission conducted pursuant to the statute mentioned above (L. 1919, ch. 611), a formal opinion was rendered. It is reported *sub nom. Matter of Manhattan*

Ry. Co. (Removal of 42nd Street Spur), 12 P. S. C. Rep. (1st Dist.) 58 (1921). The conclusion of the Commission was that traffic on the spur was steadily declining and that the removal of the spur would not cause a decline in the railroad's earnings but rather an increase. The Commission said (p. 69):

> "The conclusion to be drawn from the above is that the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street caused by the development of that section, and it is securing it without any assistance whatever from the spur, where traffic is actually on the decline.
>
> In the second place, the record shows that if this spur were removed, there would be a tremendous increase in building operations extending as far east on Forty-second Street as Third Avenue; that this would result in bringing many more people to that section, many of whom would for convenience use the Third Avenue line, and would supply a profitable short haul traffic. That the constant flow of people from these buildings to the Third Avenue line would turn much additional traffic in that direction is obvious. Accordingly, even if the lease of the elevated road to the Interborough Rapid Transit Company were to be cancelled (which seems to be a remote possibility), the removal of this spur would not cut the company off from the Forty-second Street district and would not deprive the company of its share of traffic from that district, but rather would extend that district so as to embrace Third Avenue, with much resultant benefit to the Third Avenue Elevated Railroad."

On April 22, 1921, the Commission issued a certificate which reads, in part, as follows (AX., 1108):

> "Now, therefore, the Public Service Commission for the First District
>
> DOES HEREBY CERTIFY, pursuant to said Chapter 788 of the Laws of 1917, as amended and supple-

mented by said Chapter 611 of the Laws of 1919, that the tracks, structure, station and appurtenances of the Manhattan Railway Company in East Forty-second Street, in the Borough of Manhattan, City of New York, are no longer necessary and convenient for the public service, and constitute an impediment and obstruction to the public use of said street."

This determination of the Public Service Commission, the Manhattan Railway Company, owner of the spur, made no effort to have reviewed, although under State law a writ, or order, of certiorari to the Appellate Division of the Supreme Court was a readily available and adequate remedy. See Code of Civil Procedure, §§ 2120 *et seq.*, the statute in force in 1921; and see *People ex rel. New York & Queens Gas Co.* v. *McCall*, 219 N. Y. 84, 89 (1916), aff'd 245 U. S. 345 (1918).

The consequences of this omission are obvious. *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210 (1908).

Facts.

(1)

We come now to the testimony which bears upon petitioners' present claim, item No. 1, *i. e.*, that the easements of light, air and access acquired from the abutting owners had, when condemned, a value of $3,600,000.

Needless to say, the record presents a dispute as to facts, for so far from conceding the petitioners' figure,* the City refused to concede any value to the easements.

---

* Petitioners' brief (p. 8) is unfair on this detail. The City refrained from challenging this figure because it denied the pertinence of the underlying theory. O'MALLEY, J., said (AX., 1981): "The city did not attempt to controvert this proof by the testimony of other experts. * * * In fairness to the city, however, it should be noted that its counsel at all times disregarded the claimants' theory and that adopted by me, and for this reason refrained from calling experts on this phase of the case."

There were, the Court will recall, two trials in this proceeding. The decision on the first trial was reversed for errors of law, and a new trial ordered. At this second trial the entire transcript of record (four volumes) upon the first appeal was offered and received in evidence (R., 202).

In the second volume of the testimony at the former trial, the petitioners' witness Huntley was asked the following question (AX., 852):

> "Q. What in your opinion was the fair market value of the easements of light, air and access in and over East 42nd Street appurtenant to the properties on the line of the elevated railroad spur abutting thereon, occupied and taken by the elevated railway and its operation in front of said premises at the date of vesting title in the City on December 7, 1923?"

Before the question was answered by the witness, the following colloquy took place between the Court and the attorney for the claimants (AX., 854):

> "The Court: The value to whom?
> Mr. Nichols: I said the market value.
> The Court: Don't you mean worth to the railroad?
> Mr. Nichols: The market value.
> The Court: To whom?
> Mr. Nichols: To the abutting property owners. These easements are now of course being acquired for the beneficial enjoyment of the abutting property owners."

In other words, disregarding the fundamental rule that "the question is what has the owner lost, not what has the taker gained", *Boston Chamber of Commerce* v. *City of Boston*, 217 U. S. 189, 195 (1910), the petitioners are here shown to have rested their whole case upon an inadmissible

theory of damages. And while the City is not before this Court either as an appellant or as a petitioner, yet we feel it has the undoubted right to point out the foregoing error for the purpose of defeating the efforts of petitioners to have the figure given by the witness receive the sanction of this Court. To such a figure, precedents under the Fourteenth Amendment do not, and in reason could not, lend any support whatever.

The City's objections having been overruled, the witness answered as follows (AX., 854):

> "A. $3,601,491 actual calculation, or say in round figures $3,600,000."

And see AX., 1027.

In opposition to the petitioners' contentions as to value, exemplified in Mr. Huntley's testimony, the City called Mr. Brady, who testified (AX., 953):

> "Q. I want to ask you this question: Assuming that the Manhattan Railway Company owned easements in the property abutting on 42nd Street, which enabled it to maintain an elevated railroad structure in 42nd Street, and operate cars and trains thereover free of damages and right to damages, and free of interference and right of interference on the part of the owners of property abutting on 42nd Street, and also assuming that the easements owned by the Manhattan Railway Company constitute in law an estate in the property abutting on 42nd Street which the Company can sell and convey only to the owners of the property abutting on 42nd Street, but that the only way in which the abutting owners can be put into possession of such easements in case of a sale and conveyance is by the demolition of the elevated railroad structure in 42nd Street, and the surrender of its franchise from the State and City in 42nd

Street. What, in your opinion, was the fair market value of these easements on December 7, 1923, just before title vested? A. No value."

If, as seems to be generally conceded (see *Story* v. *New York Elevated Ry. Co., supra*, and *Muhlker* v. *N. Y. & Harlem R. Co.*, 197 U. S. 544 [1905]), the so-called "easements" which the petitioners assert they were compelled to "acquire", are really the easements of light, air and access of the abutting owners which the railroad obtained the right to impair or to damage, the absurdity of the form of the question put to Mr. Huntley becomes further manifest. For the abutters were not buying back their own easements, but as a result of the condemnation proceedings found themselves repossessed of their right to enjoy them unimpaired; and they were regaining them by virtue of the fact that the railroad which had been impairing them for 46 years had lost the sole justification for its existence—public convenience and necessity.

Here, as before, we desire to emphasize the fact that the abutting owners' gain is not the railroad company's loss. The two items are forever separate and discrete, and to confuse them is to give insufficient recognition to the circumstance that one who is encumbering a public street with his structures has a far less perfect, secure and permanent right to their maintenance than he who builds a house on his own land.

A row of squatters' huts down the center of a boulevard may cut in half the value of the land bordering it; but this does not aggrandize the value of the huts for the purposes of the Fourteenth Amendment. Nuisance value has yet to attain constitutional dignity. *Consolidated Gas Co.* v. *City of New York*, 157 Fed. 849 (S. D. N. Y., 1907.)

The Court of Appeals gave in three distinct portions of its opinion an endorsement of these views as to the nature of the so-called "easements". POUND, Ch. J., said (R., 411):

> "The railroads have a State and city street franchise and an elevated structure and the right to interfere with the light, air and access of abutting owners."

And again (R., 412):

> "Quite apart from the discussion of the cases, it is clear that the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property."

And once more (R., 413):

> "such rights were obtained in order to permit the roads to exercise their franchise in the street in perpetuity."

In view of these repeated assertions, we ask the Court to attribute but little countervailing force to the somewhat looser and less thoughtful language found at the bottom of R., 411, where the same Judge said:

> "The railroad thereafter acquired title to these easements at large expense."*

We feel constrained to express regret that the petitioners should include (brief, p. 25) the statement that "what the owner lost was property which has always been valued in relation to the abutting property". The statement is regretted (1) because there is nothing in the record to support it; (2) because it is absurd in principle to suppose that

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*Judge POUND added (R., 414): "It [the railroad], therefore, acquired no real title to these easements apart from the operation of its road."

the value of the railroad's franchise should increase in value step by step with increases in the fee value of abutting property; and (3) because the statement is untrue.

To permit the abutting owners' "agitation for the removal of the spur" (petitioners' brief, p. 29; and see A[illegible], 825), to render the foregoing principles inapplicable is to ignore the settled doctrine that Courts will not inquire into the motives of the Legislature in passing statutes. See in this connection *Matter of City of New York (Ely Avenue)*, 217 N. Y. 45 (1916), where the Court said (p. 59):

> "This court has recently held that the courts will not impute to the legislature or the discretionary action of municipal bodies clothed with legislative powers other than public motives for their acts; that the presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives will be applied to the discretionary action of municipal bodies and will preclude all collateral attack (*McCabe* v. *City of New York*, 213 N. Y. 468), and this rule has long been established by decisions of this court."

That the so-called "easements" were listed in the statute (L. 1919, ch. 611) among the items of railroad property to be condemned is not a recognition by the Legislature that they must have had great value, in spite of the intimations to the contrary in the petitioner's brief (pp. 5, 6, 31). If, for example, the City desires to convert a private street (*i. e.*, a strip of land burdened with private easements of passage) into a public street, the usual way to it is to *condemn* the private street. But in view of the pre-existing burdens, the amount payable is nominal. See *Matter of City of New York (Decatur Street)*, 196 N. Y. 286 (1909).

(2)

A disproportionate importance has been assigned by the petitioners to the fact that the Courts below awarded no compensation for the easements of light, air and access insofar as they related to a certain strip of abutting property known as Depew Place.

This small street leads northward from the north side of 42nd Street, but does not cross the latter (AX., 1932). It is 50 feet in width, and was open as a public street from 1885 until 1905, when it returned to private ownership. It was thus privately owned in 1923, the date of the condemnation of the spur (R., 266).

No award for the easements of the railroad in front of this 50 foot Depew Place was made. The Trial Justice held that either the railroad had never acquired rights in the frontage (it never purported to buy them, and the strip was not in private ownership long enough for prescription to be accomplished), or that the rights if acquired were like the rights to cross any other intersecting street and hence not such that the City would have to pay for them upon their termination.

(3)

The petitioner's claim to an award of reproduction value less depreciation, for the physical structure in the street, was sought to be established by the testimony of the witness Burpee. He at first testified (AX., 341) that the estimated cost less depreciation was $201,322, but subsequently modified this estimate by deducting certain items of the structure found to be outside of the condemnation area, so that he gave a net figure of $185,513.

This testimony was based upon the premise that the spur was "a suitable structure for the operation of the elevated railroad in this locality" (AX., 387).

The City brought out upon the cross examination of one of the claimant's witnesses, Mr. Harden, a steel contractor, that he had purchased from the railroad the iron pillars and other portions of the structure for the sum of $255. As Mr. Harden had contracted to take down and carry away the structure, this sum represented the net value of the structure after the performance of such services.

A minor error in the record seems to have been made in the transcription of this figure, for Mr. Justice MULLAN recited in his opinion (R., 331) that the parties had agreed that the junk or scrap value of the structure was $235.00.

The City justified the use of this figure rather than the very much larger figure advocated by the claimants,* by pointing out that the claimants had failed to show that any reasonably prudent man would reproduce an elevated spur in 42nd Street at the time in question (AX., 339). And in view of the certificate of the Public Service Commission (*ante*, p. 5), which at this time had already been given, that an elevated spur in 42nd Street was no longer necessary or convenient for the public service, the possibility that anyone would reproduce the structure and operate it was obviously too fantastic and speculative to support a claim of unreasonableness in the figure adopted by the Court.

We submit that Mr. Justice MULLAN's holding was correct, for reconstruction costs possess pertinence in condemnation cases only where the structure is, at the moment of condemnation, suitable and adequate for a purpose for which the neighborhood is adapted. See in this connection

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* The City's expert gave testimony in rebuttal as to reproduction value less depreciation, without prejudice (AX., 458) to the City's main contention. This expert placed the figure at $120,438 (AX., 467).

United States v. *Boston, Cape Cod & N. Y. Canal Co.*, 271 Fed. 877 (1st Circ., 1921), where the Court said (p. 889):

> "It seems to us that this is a necessary limitation upon the application or use of the rule when construction prices are abnormal, and that the court below either should have passed upon the preliminary question of fact himself, or submitted it to the jury, with instructions that *they should not consider the evidence of reconstruction cost* upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or undertake the construction of the property at such a figure." (Italics ours.)

(4)

The railroad proceeded to erect its structure in 1878 pursuant to L. 1875, ch. 606. Under § 26 of this statute, railroad corporations are, when the existence of a need for a railroad has been certified by competent authority (see § 1), empowered to use the street, and "in all cases the use of the streets, avenues, places and lands designated by the said commissioners and the right of way through the same for the purpose of a railway or railways as herein authorized and provided, shall be considered, and is hereby declared to be a public use • • •."

The value of this franchise and the right to be in the street was the subject of extensive testimony by the petitioners' witnesses.

Mr. Burpee, on behalf of petitioners, assigned a value of $400,000 to the franchise and right to be in the street but on direct examination failed to show how he figured it. Naturally, the Assistant Corporation Counsel did not let him repair the omission on cross examination. The following colloquy occurred (AX 1026-1027):

> "Q. What is your total estimate? A. $4,170,000.

Q. How much of that was for the value of the easements which the company claimed to have gotten from abutting owners? A. $3,600,000.

Q. How much was it for the value of the space to the City? A. $300,000.

Q. And what is the difference? That makes $3,900,000. What is the difference between $3,900,000 and $4,170,000? A. Cost to reproduce the physical structure $176,100; other elements of franchise value $100,000, totalling $4,176,900, which I have rounded down to an even $4,170,000.

Q. You have already testified to the cost of reproduction? A. Yes, sir.

Q. Is this the same figure? A. Yes, sir.

Q. Now, this $100,000 for franchise rights, what do you mean by that? A. Those are all the other elements of the franchise value possessed by the Manhattan. The spur was an integral part of a system of the Manhattan Railway Company's property... It was contributing net earnings, and by its removal the net earnings of the system—

Q. I did not ask you how you got at it. I asked you what that was for. All other rights you said, didn't you? A. Yes, sir."

There would seem to be no basis for inferring the transfer to the railroad of title in fee to all the little areas where the pillars rest.* The franchise and right to be in the street are not to be valued at so much per square foot of street physically occupied. Franchises even when bound up with a right to be in a public street are incorporeal property, and long established usage shows that valuation by earnings is the proper mode of valuation. *People ex rel.*

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* The intention to transfer title to areas in the street is negatived by the fact that the railroad was at no time granted leave to use the street for any and all purposes, but only to operate an elevated railroad. When that use has ceased to be lawful, no considerations of policy require the railroad to be accorded an interest or estate in the street which would survive such cessation. *Heard* v. *City of Brooklyn*, 60 N. Y. 242 (1875), *post*, p. 20.

Jamaica Water Supply Co. v. *Tax Com'rs*, 196 N. Y. 39, 55 (1909); *Montgomery County* v. *Schuylkill Bridge Co.*, 110 Pa. St. 54, 59 (1885).

The City contended that the franchise and its incidents, on these principles, had no value, in view of (1) the issuance by the Public Service Commission of the certificate (AX., 1108) that the spur was no longer necessary or convenient for the public service, and (2) the concurrent factual findings of the Courts below (R., 290, 414-415) that the spur could no longer be operated, except at a large annual loss. And the City, in addition to relying upon these factors, also called two witnesses.

One of these, Dr. Bauer, was asked a hypothetical question (AX., 616-617), as to the value of the "elevated structure, tracks, stations, platform, stairways and appurtenances and all rights, easements and franchises of every nature whatsoever under which said elevated structure, tracks, stations, platforms, stairways and appurtenances were constructed and maintained, and also the right, easement and franchise to further maintain said elevated railroad structure, tracks, stations, platforms, stairways and appurtenances"; and he answered (AX., 622):

> "A. I believe there is no value, except whatever scrap value there might have been on demolition."

To a substantially similar hypothetical question (AX., 792), Mr. Brackenridge, another City witness, said (AX., 793):

> "A. Of no value except scrap value."

Dr. Bauer went on to explain (AX., 622) that if he had thought the demolition of the spur would decrease the income of the Third Avenue line, he would have assigned some value to the spur. But, he said,

> "on the contrary I believe it [demolition] will increase the net earning power of the system."

In adverting to the spur's want of earning power at the moment of condemnation, we are not unmindful of the general proposition stated by petitioners (brief, pp. 43-44) that "where property taken is part of a profitable system, constitutional protection against confiscation" should not be denied "because the particular part taken produces an operating loss". We maintain the case fails to present a minor premise under the major premise thus phrased. The distinguishing feature of the case at bar lies in the fact, stressed by the Public Service Commission, *ante*, p. 5, that the demolition of the spur would not merely put an end to a loss but, by increasing the attractiveness of the neighborhood, the size of the office buildings which it would pay to erect there, and hence the population and business activity of the region, demolition would positively increase traffic on the main line along Third Avenue.

Argument.

We trust we have made it clear that the property which the petitioners maintain was so grossly undervalued as to deprive them of rights guaranteed by the Fourteenth Amendment, was property of an unusual character, and possessed features so extraordinary that care must constantly be taken to avoid the inconsiderate application to it of decisions intended to apply to property with more conventional attributes. Noteworthy among the characteristics of petitioners' property were its inadaptability to other than its actual use, its unassignability, and its *symbiosis* with public necessity and convenience, in the sense that when the latter concepts ceased, it expired, so to speak, concurrently.*

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* Public convenience and necessity may be said to bear to the petitioners the relationship which a *cestui que vie* bears to the holder of an estate *pour autre vie*.

It is the function of the Fourteenth Amendment not to create property rights but to protect them. We must turn to the State law to ascertain what sort of rights have been created before we can say whether any particular act on the part of the State has accorded to those rights less than the constitutional standard of protection.

This brief, as announced *ante* page 2, deals principally with the nature of the petitioners' property. That the pursuit, to their logical conclusion, of the doctrines evolved by State law for the limitation of that property and its qualification by special attributes, does not violate constitutional limitations will be discussed in the brief of the Respondents GOELET *et al.*

Upon the record as hereinbefore outlined, we propose to argue as follows:

1. The failure of the railroad to appeal from the decision of the Public Service Commission disentitles it to relief in this Court.
2. Under the doctrine of *Heard* v. *Brooklyn*, 60 N. Y. 242, the easements acquired by the railroad reverted automatically to the abutting owners when the operation of the railroad ceased.
3. The theory of unjust enrichment may not be invoked to justify an increase in the awards.
4. The "most advantageous use" doctrine has no application to an elevated spur which under the law can be used for but a single purpose.

POINT I.

The failure of the railroad to appeal from the decision of the Public Service Commission disentitles it to relief in this Court.

The maxim *petere fontes, non sectari rivulos,* possesses a certain pertinence to the case at bar. The petitioners complain of their inability to collect from the respondents more than a paltry $539,352.41 (with 11 years' interest) for the property which was condemned. But, in the last analysis, what caused them to lose it and to receive such a pitifully small compensation for it, was the order and certificate of the Public Service Commission finding that the spur had ceased to be either necessary or convenient for the public service. That order and that certificate dealt the spur its deathblow. They were the *fons et origo* of the petitioners' misfortunes. From that moment the spur was moribund. Obviously the certificate operated directly to destroy the petitioners' claim to higher compensation than they received, for there could be no market for a structure (or the privilege of erecting one) so long as the Public Service Commission's determination, that the structure was no longer necessary or convenient for the public service, remained outstanding and unreversed.

If the petitioners felt aggrieved by the determination, they should have secured its review upon certiorari, as was their privilege under State law (see *ante*, p. 6). As they did not do so, they cannot complain of reductions in the value of their property flowing directly from such determination. From that omission proceeded the whole of their distress and the affliction is not one from which they can secure relief in this Court.

The case of *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 230 (1908), held that where a State Commission had, after hearings, ordered adherence to a schedule of railroad rates, a carrier who deemed them confiscatory was under the duty to exercise a right to appeal to the state court of last resort from the Commission's order before seeking to enjoin its enforcement in a federal district court.

To substantially the same effect is *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265, 269-270 (1924).

POINT II.

Under the doctrine of *Heard* v. *Brooklyn*, the easements acquired by the railroad reverted automatically to the abutting owners when the operation of the railroad ceased.

Under State law an easement, or similar *jus in re aliena*, acquired for a particular purpose generally ceases and determines, and may be said to revert to the owner of the land across which the easement has been acquired, whenever the use to which the easement was a *sine qua non* ceases.

An express decision to this effect is *Heard* v. *City of Brooklyn*, 60 N. Y. 242 (1875). Here a railroad company had obtained from the legislature authority to appropriate the use of lands for railroad purposes, and in exercise thereof had acquired the use of a strip of land adjoining a certain avenue. Subsequently the defendant decided to widen the avenue, and received from the railroad a deed to so much of its right of way, stripped of the tracks, as was needed to bring the avenue to the desired width. The plaintiff, as successor in interest to the parties from

whom the railroad had secured its rights of way, brought ejectment; and the Court of Appeals held that the complaint stated a good cause of action. A judgment of dismissal was accordingly reversed, and a new trial ordered.

The Court pointed out (p. 246) that the railroad in exercising its statutory powers "became entitled only to the use of the land for the purpose of operating its railroad. The fee remained in the original owners, subject only to that use, and on the discontinuance of the use, the owners were entitled to resume possession of the land." This reversionary interest arises whenever (p. 247) "land has been taken for a particular use only, and that use is discontinued and abandoned."*

The logic of this decision seems unanswerable. It has stood unchallenged for nearly sixty years. *It antedated the acquirement of the easements in the case at bar.* And we know of nothing in the Federal Constitution which permits one who has acquired a piece of property, with this well-defined characteristic of evanescence, to reject the essence of his purchase and argue that he bought something entirely different.

See also *Drucker* v. *Manhattan Ry. Co.*, 213 N. Y. 543 (1915), where in the course of an inquiry into an abutting owner's right (upon selling his land) to reserve to himself the right to claim damages to easements of light and air caused by the erection of an elevated railroad, the Court said (p. 551):

> "The whole difficulty in this case is theoretical and results from the fact that we are dealing with an incorporeal right. * * * Here the thing itself could not be reserved because from its nature it could not

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* The powers of the railway company in the case at bar to acquire property are couched in language (L. 1875, ch. 606, § 17) substantially similar to that used in the statute before the Court in the *Heard* case.

> exist independently of the land. But its equivalent or substitute, the damages caused and to be caused by the appropriation of it by a third party, was reserved."

This incapacity of the easements to exist in the railroad apart from the franchise and the physical structure impairs their alienability. In fact, it makes it impossible to assign them in gross. This circumstance consequently impairs their value.

The quality may be said to be a "congenital infirmity"* in the easements, and not an acquired characteristic flowing from action taken by the State after the easements came into existence. This being so, the Courts below rightly took it into account in rejecting the petitioners' claims to have the easements valued at what the abutting owners could sell them for if the structure were being erected today.

POINT III.

The theory of unjust enrichment may not be invoked to justify an increase in the awards.

The arguments which we advanced in the preceding point as to the evanescent character of the easements show that the petitioners obtained more, rather than less, than they were entitled to when POUND, Ch. J., held (R., 413):

> "* * * the city should reimburse the railroads for what it cost them to acquire such easements when it terminates the right of use in perpetuity."

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* *Norman* v. *Baltimore & Ohio R. Co.*, 55 Sup. Ct. 407, 416 (U. S., 1935).

Judge Pound evidently accorded some force to the theory of unjust enrichment put forward by the petitioners.

We contend, nevertheless, that this theory has too slender a basis in fact to require this Court, on constitutional grounds, to upset as inadequate the awards made below.

The basis of the unjust enrichment of the abutting owners seems to rest in the notion that their property underwent a sudden and tremendous increase in value when the spur was removed. From this, petitioners appear to spell out something legally akin to a transfer of an article of value from the railroad to the abutting owners, for which the latter should pay fair value.

But Judge Pound pricked this bubble when he said (R., 413-414):

> "That these easements would be worth $3,600,000 to the abutting owners if they now owned them is beside the point. What is the city taking from the railroads? That is the question."

It is important to note at this juncture (and in answer to arguments made at pages 32, 34 and 37 and elsewhere in petitioners' brief) that while, as matters now stand, the burden of remunerating the petitioners rests upon the abutting property owners (*ante*, p. 1), nevertheless there always exists the possibility that the Municipal Assembly of the City of New York may under the authority of L. 1924, ch. 363, §§ 16 and 17 (the City Home Rule Law), as amended by L. 1925, ch. 397, pass a Local Law changing the incidence of the burden from the adjacent property owners, and spreading it over the Borough of Manhattan, or the City at large, as a tax levy payable in annual instalments.

Furthermore, if the contentions of the petitioner be rephrased to stress the fact that by the railroad's act in removing the spur, the abutting property was freed from a depressing influence, the answer is that the railroad was not making a voluntary gift but was simply discontinuing an activity which had since 1921 ceased to possess any legal sanction. Forbearance to do an illegal act is no consideration for an express promise, and is equally incapable of supporting a suit founded upon *quantum valebat*.

Nor does the unjust enrichment theory gain plausibility when we view the case (for the sake of argument) as an instance of failure of consideration for the sums paid by the railroad in 1888-1904 under the compulsion of the *Story* case (*supra*). For forty-six years the railroad enjoyed a *quid pro quo;* and the spur having ceased to produce profits and ceased to be a public convenience through no act of the abutters, no case is made out for a duty on their part to refund the purchase price. On the contrary, the continued existence of the spur until it had become an anachronism, really caused losses to the abutters far exceeding the consideration originally paid them; for its presence prevented them for years from developing their land with modern skyscrapers in keeping with developments on neighboring property.

In contending that the easements for which the railway company paid valuable consideration in the years 1888-1904 were taken from them at the time of the condemnation of the 42nd Street Spur, the petitioners appear to have lost sight of the distinction between the "taking" of a piece of property, and the termination of an incorporeal right. That the occurrence in the case at bar was of the latter rather than of the former category is apparent from the holding

of this Court in *Omnia Commercial Co., Inc.* v. *United States*, 261 U. S. 502 (1923), where this Court said (p. 508):

> "The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."

And again (pp. 510-511):

> "What was here requisitioned was the future product of the Steel Company, and, since this product in the absence of governmental interference would have been delivered in fulfillment of the contract, the contention seems to be that the contract was so far identified with it that the taking of the former, *ipso facto*, took the latter. This, however, is to confound the contract with its subject-matter. * * * Plainly, here there was no acquisition of the obligation or the right to enforce it."

See also *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, 95 (1933).

POINT IV.

The "most advantageous use" doctrine has no application to an elevated spur which under the law can be used for but a single purpose.

We have already suggested (*ante*, p. 17) that there is danger in this case of overlooking certain distinguishing features of the railroad's property, and of applying lead-

ing cases to the situation without an inquiry into whether the facts justify such action. In other words, we beg leave, with deference, to urge upon the Court circumspection against false analogies.

In *Olson v. United States*, 292 U. S. 246 (1934), this Court said (p. 255):

> "The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held."

And again in *Boom Co. v. Patterson*, 98 U. S. 403 (1879), this Court said (p. 408):

> "So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The New York courts are as well aware as any of the soundness and justice of these holdings as propositions applicable to the generality of cases. See *Matter of City of York (Blackwell's Island Bridge)*, 198 N. Y. 84, 87 (1910).

But all these references to "highest and most profitable use" or "uses for which the property is suitable" (see

petitioners' brief, p. 23) lose their relevance for the simple reason that no option, no range of choice, is or ever was available to the railway company. Its presence in the street was sanctioned for one purpose only, the maintenance of an elevated railroad. That right was defeasible by appropriate action, taken pursuant to law, by the Public Service Commission. The company's easements were never assignable in gross. It could not have erected stores or dwellings upon its structure, nor conveyed to anyone the right to do so. Hence the dissenting Judge erred when he attributed to the easements "the value which the owner could otherwise have obtained as the price of their sale or abandonment" (R., 422).

These contentions are, we maintain, well founded in theory. They are also well founded in fact. For notwithstanding the wide latitude allowed the petitioners in the introduction of evidence, the Appellate Division said of the easements in question (R., 302):

> "No one would acquire them today for the purpose of running a railroad."

And again (R., 302-303):

> "The railroad urges that it might have abandoned the spur and sold these rights to the property owners. But such a proposition is based upon fanciful assumptions, to sustain which there is no evidence in this record. Testimony is lacking to show that any or a sufficient number of property owners would or could purchase said rights. The argument presupposes a relinquishment of all other damages because it would be necessary to demolish the structure and rebuild the Third Avenue station in order to deliver a single so-called easement. [The Court of Appeals agreed. See R., 414.] Market value cannot be predicated upon a single sale. In addition, it has already been judicially determined that such a con-

> sideration is a mere 'hypothetical possibility'. (*McGovern* v. *City of New York*, 229 U. S. 363; *City of New York* v. *Sage*, 239 U. S. 57.)"

In view of these expressions from the Court below, this Court will, we believe, be somewhat unsympathetic toward the petitioners' remonstrances (brief, pp. 22, 25, 26 and 34) against the persistence of the Courts below in "ignoring its [the spur's] availability for other uses or for sale" (p. 22).

Not only was no other use lawful under L. 1875, ch. 606, but any other use would have been a breach of the conditions upon which the railroad procured for a consideration the right to impair the abutters' easements of light, air and access. These conditions expressly limited the permissible impairment to such as was "caused by said maintenance and operation of said railroad as the same is now constructed, maintained and operated • • •; provided, however, that in no case shall said structures, or the operation of trains thereon be changed, enlarged or added to, so as to materially increase the encroachments upon the easements • • •" (AX., 1649-1650). The condemnation order contained substantially the same words of qualification (AX., 1754).

Consequently, whenever, for instance, the elevated railroad has found it necessary to increase the tracks along a given street from two to three, it has always had to make a further payment of compensation to the abutters. *Rothschild* v. *Interborough Rapid Transit Co.*, 162 N. Y. App. Div. 532, 147 N. Y. Supp. 1040 (1st Dept., 1914).

Further evidence of the qualified rights of the railroad in the easements is found in the language of Chief Judge Pound, at R., 414, where he said:

> "It [the railroad], therefore, acquired no real title to these easements apart from the operation of its road."

Conclusion.

We believe that the foregoing exposition of the law of New York, coupled with the analysis of the decisions of this Court under the Fourteenth Amendment so effectively made in the brief filed on behalf of the Respondents Goelet, *et al.*, require the affirmance of the order and judgment under review. We are likewise confident that the Court will not lose sight of the peculiar attributes of the property for which the protection of the Constitution is sought, especially the clauses in the easement deeds cited *ante*, p. 28; nor will the Court be misled by the false analogy of cases dealing with land owned by a condemnee in fee. And we finally maintain that when an elevated railroad spur has remained standing in the heart of a great city, and has prevented the abutting property from developing *pari passu* with the rest of the neighborhood, a claim that the railroad may profit by its maintainance of an anachronism is a shameless and intolerable exaltation of nuisance value. To hold that the Fourteenth Amendment protects and sanctions such practices would not add lustre to the Constitution.

The order and judgment should be affirmed, with costs.

Dated, New York, N. Y., April 1, 1935.

Respectfully submitted,

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APR 1
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1934—NO. 546.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

—against—

THE CITY OF NEW YORK, and others,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR RESPONDENT CORN EXCHANGE BANK.

FRANK C. LAUGHLIN
and
SPOTSWOOD D. BOWERS,
Counsel for the Corn Exchange Bank.

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THE COURT PRESS, N. Y. C.

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Argument:

POINT I—The so-called easements or rights of the claimants to impair the easements of light, air and access of the abutting owners which were acquired for, and appertained only, to the operation of the Spur were extinguished upon the removal of the Spur, which was judicially determined to be not only no longer necessary and convenient for the public service, but an impediment and obstruction to the public use of the street, and any rights the claimants had to impair or encumber the abutting property owners' easements of light, air and access upon the removal of the Spur reverted to the said property owners who then held their easements of light, air and access in their full integrity, unimpaired and unencumbered by any easements or rights of the claimants, and claimants having received an award of $539,117.41 for the alleged "taking" of their so-called easements, are not aggrieved by the judgment of the Court below, for we submit that there is no warrant, in fact or law, for any award whatsoever to the claimants for these so-called easements 7

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Supreme Court of the United States

OCTOBER TERM, 1934—NO. 546.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

—against—

THE CITY OF NEW YORK, and others,

Respondents.

BRIEF FOR RESPONDENT CORN EXCHANGE BANK.

Statement of the Case.

It will, in view of the briefs filed by the other respondents, be unnecessary for us to give any detailed statement of facts. We shall confine ourselves, for the most part, to the facts particularly applicable to this respondent and to those upon which our argument hereinafter made is principally predicated.

The Manhattan Railway Co. and the Interborough Rapid Transit Company will hereinafter be referred to respectively as "Manhattan Co." and "Interborough Co."

The right or franchise of the Manhattan Co. to operate the Third Avenue Line and the 42nd Street Spur is predicated on the provisions of the Rapid Transit Act of 1875 (Laws 1875, Ch. 606—*Mayor, etc. of New York* v. *M. R. Co.*, 143 N. Y. 1 at pp. 31-33). Pertinent provisions of said statute are set forth as Appendix "C" in the brief of the other property owners from which it will be noted that all that

the railway company could acquire by conveyance, condemnation and prescription was the right to impair the easements of abutting property owners "for the purposes of its incorporation" so long as the Spur was maintained and operated for railroad purposes.

The Spur structure was the familiar elevated roadway and rails supported by girders resting upon iron columns sunk into the earth (R. Ex. A-X, 337). The Spur was a one track line at the easterly end, two tracks in the middle and three tracks at the westerly end (R. Ex. A-X, 297) upon which the Manhattan Co. operated two trains consisting of two cars each during rush hours and of only one car at other hours. These trains had to operate simultaneously in opposite directions so as to pass between the stations at either end of the Spur, it being impossible for the two trains to stand at the same station (R. Ex. A-X, 298-9).

The assessment for benefits against this respondent's property is in the sum of $27,017.34 (R. 142), upon which amount interest is payable from May 7, 1932 (R. Ex. A-X, 89, 94). This respondent's property affected by the judgment in this proceeding consists of four parcels of real property described by lot, block and map numbers in its objections (R. 142). The actual locations of these four parcels are shown on the Benefit Maps attached to the final decree (R. 35, Ex. A-X, 1890). See Benefit Map No. 8 showing Block No. 1297, Lot 21, having a frontage of fifty feet on the north side of Forty-second Street between Lexington Avenue and Third Avenue and extending back to the middle of said block. This parcel is in Zone A. See also Benefit Map No. 6, showing Block No. 1277 and Lots 5 and 6, having an aggregate frontage of forty feet on the north side of Forty-second

Street between Madison Avenue and Fifth Avenue and extending back to the middle of said block. Said lots are in Zone C (R. Ex. A-X, 91). The remaining parcel is Lot 67½ in Block No. 1277 and is shown on the same Benefit Map immediately in the rear of Lots Nos. 6 and 7, having the following dimensions: 25 feet by 35 feet. Said lot 67½ is in Zone D (R. Ex. A-X, 91).

In view of the fact that the history of the proceedings is covered in the City's brief, we shall merely summarize the findings of the Trial Court on the retrial of the case. The Trial Court found that the claimants were entitled to no award for the Spur franchise, but were entitled to an award of $235 for the physical structure of the Spur conceded to be its scrap value and to $539,117.41 for the right to impair the abutting owners' easements of light, air and access (R. 340, 341; 141 Misc. at p. 572). The other item of $80,000 awarded for the cost of the reconstruction and alteration of the Elevated Station at East 42nd Street and Third Avenue will not be discussed for that item of award is not before the Court.

The final decree included the foregoing items of award in the aggregate sum of $619,352.41 with interest and costs in the sum of $1,014,905.52 (R. 85).

All parties appealed from the foregoing judgment to the Appellate Division which affirmed said judgment without opinion R. 388; 238 App. Div. 832) and thereafter upon cross appeals taken by all parties to the Court of Appeals said Court affirmed the judgment (R. 410; 265 N. Y. 170).

The claimants' evidence that their rights or so-called easements to impair the abutting property owners' easements of light, air and access were of the value of $3,600,000 (R. Ex. A-X, 854) is arrived at

by taking, at the time of the City's acquisition of the title to the Spur structure, the difference in the estimated values of the property abutting on the 42nd Street Spur before and after the removal of the spur structure—in other words, the amount of the increased value of said property resulting from the removal of the structure from 42nd Street (R. Ex. A-X, 864-5, 866).

The foregoing valuation of $3,600,000 is the claimants' estimated amount for which the Manhattan Co. could sell these so-called easements "separate and independent" of the railroad "in the open market" either to the City of New York or to abutting property owners (R. Ex. A-X, 858-9, 866).

Claimants' evidence shows that with respect to the greater part of the abutting property the easements were acquired by private settlement (R. 320-1, Claimants' Ex. C-X and D-X). It is shown (R. 319) by Claimants' Ex. B-X and their evidence (R. 236) that claimants paid only $175,199.99 for these so-called easements by virtue of judicial determinations and only $91,295 in settlement cases which latter, also covered past damages, making, including said damages, a total sum of $266,494.99 paid for said easements (see R. 319 and Claimants' Ex. B-X).

Summary of Argument.

We do not discuss in this brief claimants' alleged right to receive an award for the franchise of the Manhattan Co., which the courts below have found was valueless, nor their claim that they should have received a larger award for the Spur structure, which the courts below have found had only a junk value, for these valuations are findings or conclusions of fact predicated on other findings of fact which will, as we understand, be accepted as final by this Court.

But in any event there is no merit to the claimants' contention in this respect for their claim, as we understand it, is that the abutting owners might have been willing to pay the Manhattan Co. a considerable sum of money in order to acquire the Spur, not for the purpose of operating it, but for the purpose of abandoning its operation and removing the structure from the street on account of the fact that the presence of the Spur in the street impaired the value of the abutting property.

With respect to the award to the claimants for the extinguishment of these so-called easements or rights to impair easements of light, air and access of the owners of the property abutting on 42nd Street, we contend that the claimants in no event are aggrieved by the judgment of the court below, under which they were awarded $539,117.41 for the extinguishment of these so-called easements, for we respectfully submit that under well established principles of law they were not entitled to any award for their so-called easements.

We show in Point I below that these so-called easements were devoid of any value to the Manhattan Co. for the operation of the Spur was a financial burden to the Manhattan Co. and the Interborough Co. for it could be operated only at a large annual loss, and furthermore, the so-called easements were appurtenant to the Spur and were incapable of severance or transfer independently of the Spur, and upon the condemnation of the Spur and the removal of the structure from the street, the claimants' so-called easements or right to impair the abutting property owners' easements of light, air and access reverted to these property owners.

We maintain that claimants' contention that these so-called easements or rights should be valued sepa-

rately and apart from the Spur for purposes wholly foreign and disconnected with the Spur is manfestly unsound and wholly without merit. The Manhattan Co. acquired these rights only for the operation of the Spur in 42nd Street and could not have transferred these rights except as an integral part of the Spur itself which was without value other than a nominal junk value. The claimants contend in this connection that the Manhattan Co. might have transferred these rights or easements to the abutting property owners for the amounts which the removal of the Spur structure would have increased the value of their properties.

Plainly speaking the claimants are seeking an award for the so-called easements on a speculative nuisance value basis, of necessity predicated on the false postulate that the claimants could have removed the Spur structure piecemeal after dickering and bargaining with each of the abutting owners for the payment to the claimants of the nuisance value of the structure in the street.

We submit that the claimants were entitled to an award for the value, if any, of their property appropriated in the condemnation proceedings at the time said property was taken, but we contend that claimants' so-called easements had no value at that time. The law is well settled by an abundance of authority that when property is appropriated for a public purpose, in the assessment of damages *the question is not what has the taker gained but what has the owner lost,* and that the owner is not entitled to the cost of the property, which may have greatly increased or decreased since its purchase, but only to the value of the property at the time of the taking, and we claim as a matter of fact and of law in the instant case that these so-called easements had no value at the time the Spur was appropriated.

Argument.

POINT I.

The so-called easements or rights of the claimants to impair the easements of light, air and access of the abutting owners which were acquired for, and appertained only, to the operation of the Spur were extinguished upon the removal of the Spur, which was judicially determined to be not only no longer necessary and convenient for the public service, but an impediment and obstruction to the public use of the street, and any rights the claimants had to impair or encumber the abutting property owners' easements of light, air and access upon the removal of the Spur reverted to the said property owners who then held their easements of light, air and access in their full integrity, unimpaired and unencumbered by any easements or rights of the claimants, and claimants having received an award of $539,117.41 for the alleged "taking" of their so-called easements, are not aggrieved by the judgment of the Court below, for we submit that there is no warrant, in fact or law, for any award whatsoever to the claimants for these so-called easements.

Before considering the character of the claimants' rights to impair these easements of the abutting owners, which rights of impairment are sometimes referred to as easements, it is well briefly to consider the property with which these so-called easements were connected or appurtenant to, that is, the Spur, and we distinctly do not mean that these so-called easements of the Manhattan Co. were of light, air and access for those easements, as we presently show, were appurtenant to the abutting property from which they were incapable of being dissevered. In other words the rights or easements of the Man-

hattan Co. did not consist of light, air and access but of the right of immunity or non-liability for impairing those easements which were appurtenant to the abutting property.

A. This court has held that "in cases coming from a state court we do not review questions of fact but accept the conclusion of the state tribunals as final". (*Chrisman* v. *Miller,* 197 U. S. 313, at p. 319, citing cases; see also *Great Northern Ry. Co.* v. *Donaldson,* 246 U. S. 121, at p. 124; *Gleason* v. *White,* 199 U. S. 54, at p. 60.)

The Public Service Commission found, pursuant to proceedings taken prior to the removal of the Spur structure, that the Spur was no longer necessary and convenient to the public service and constituted an impediment and obstruction to public use of the street (R. Ex. A-X 1101).

Mr. Justice O'Malley at the first trial held that the Spur was not profitably operated (R. Ex. A-X; 126 Misc. at p. 895) and the Appellate Division distinctly stated on the first appeal that the cost of operation of the spur exceeded the yearly revenue received by many thousands of dollars and that the *removal of the Spur structure was a distinct and positive benefit to the claimants* (R. 299, 301, 305; 229 App. Div. at pp. 627, 628 and 629). The Court of Appeals confirmed the foregoing findings that the franchise to operate the Spur was worthless and that the structure had under the circumstances only a junk value (R. 414; 265 N. Y. at p. 182).

It should be borne in mind that the Manhattan Co. could not use the space occupied by the Spur structure for any other purpose, for it has been held that after acquiring the right to impair the easements

of light, air and access of abutting property owners, it had no right to add a third express track or substantially change the elevated structure in the street. (*Knoth* v. *Manhattan Ry. Co.*, 187 N. Y. 243; *Rothschild* v. *Interborough Rapid Transit Co.*, 162 App. Div. 532; *Auchincloss* v. *Met. El. R. Co.*, 69 App. Div. 63.)

The value of property, generally speaking, when appropriated is determined by its productiveness, that is, by the profits it brings to the owner (*Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312; *Northern Pac. Ry. Co.* v. *N. American Tel. Co.*, 230 Fed. (C. C. A. 8th Cir.) 347, at p. 352; *Oshkosh Water Works Co.* v. *Railroad Commission*, 161 Wisc. 122; 152 N. W. 859; *Clarion Turnpike & Bridge Co.* v. *Clarion County*, 172 Pa. 243, 33 Atl. 580; *Kennebec Water Dist.* v. *City of Waterville*, 97 Me. 185, 54 Atl. 6).

In *Monongahela Navigat'n Co.* v. *United States*, *supra*, the court said at page 328:

> "How shall just compensation for this lock and dam be determined? What does the full equivalent therefor demand? The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner."

Manifestly the Spur which was operated at an annual loss of many thousand of dollars was only a burden to the Manhattan Co. and the claimants sustained no damage by the appropriation of the Spur and the removal of the Spur structure.

B. The abutting owners' easements of light, air and access were by their very nature incapable of

being taken or acquired by the Manhattan Co. so as to become appurtenant to the Spur.

The courts have held that these easements were indissolubly annexed to the abutting land and incapable of distinct and separate ownership. (*Kernochan* v. *N. Y. E. R. R. Co., et al.*, 128 N. Y. 559; *Bohm et al.*, v. *M. E. R. Co., et al.*, 129 N. Y. 576; *Newman* v. *M. E. R. Co.*, 118 N. Y. 618.)

In *Kernochan* v. *N. Y. E. R. R. Co., et al., supra,* the court said in referring to the easements of light, air and access, page 568:

> "The easements of an abutting owner, invaded, are appurtenant to his premises, and in the nature of things they are indissolubly annexed thereto until extinguished by release or otherwise. They are incapable of a distinct and separate ownership."

In *Bohm et al.* v. *M. E. R. Co., supra,* the court said, page 588:

> "It is not the light or the air that is valuable separated from the land adjoining. With regard to the subject under discussion there is and can be no value in a given quantity of air, or space, or light in the public street except as it may be used in connection with and as appurtenant to the abutting land. When a person interferes with such light, air or access and takes it, he takes nothing which is alone and intrinsically valuable, but only as its loss affects the adjoining land."

Of course, by the erection of the Spur structure, there was a "taking" within the meaning of the state and federal constitutions by the Manhattan Co. of

property rights of the abutting owners by the trespass on their easements within the principles enunciated by the Court of Appeals. (*Story* v. *N. Y. Elevated R. R. Co.*, 90 N. Y. 122; *Lahr* v. *Metropolitan Elevated R. Co.*, 104 N. Y. 268, at p. 288.)

Though the impairment of the easement rights of the abutting owners constituted such a taking as to render the Manhattan Co. liable to the owners for the damages occasioned by such taking, the Manhattan Co. did not acquire the easements which it impaired. Pound, *Ch. J.*, in the instant case in this connection succinctly summarized the extent of the rights acquired by the Manhattan Co., stating, "* * * it is clear that the railroad *merely exhausted the right of the abutting owners to complain because a railroad was in the street and so trespassing on their property*" (R. 412; 265 N. Y. at p. 180).

These easements of light, air and access appurtenant to the abutting property, impaired by the Spur structure, again became perfect in the abutting owners and usable to their full extent upon the removal of the structure from the street. And this whether the structure was removed voluntarily or in proceedings *in invitum*.

The extinguishment of the Manhattan Co.'s right to impair the abutting owners' easements did not constitute a "taking" of the property within the meaning of the constitution, for destruction or injury to property is frequently accomplished without a taking in the constitutional sense. (*Omnia Commercial Co. Inc.* v. *United States*, 261 U. S. 502; *Mullen Benevolent Corp.* v. *United States*, 290 U. S. 89, at p. 94; *Puget Sound Co.* v. *Seattle*, 291 U. S. 619; *C. B. & Q. Railway Co.* v. *Drainage Comm'rs*, 200 U.

S. 561; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53; *United Railroad* v. *San Francisco*, 239 Fed. 987, 997.)

In *Omnia Commercial Co. Inc.* v. *United States*, *supra*, the court said, page 508:

> "The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense."

In *Puget Sound Co.* v. *Seattle*, *supra*, the court said, page 626:

> "The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state, *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 400; *St. Louis* v. *United Railways Co.*, 210 U. S. 266, 276, nor can it relieve property of congenital defects, *Madera Water Works* v. *Madera*, *supra*, 456."

In *C. B. & Q. Railway* v. *Drainage Comm'rs*, *supra*, the court held that the railway company was not entitled to any compensation for the removing of a bridge lawfully constructed and for reconstructing a larger bridge to afford a wider channel as directed by the Drainage Commissioners. The court held that there was no taking of the railway's property within the meaning of the constitution, stating, after discussing similar cases, page 584:

> "* * * in each of those cases, this court recog-

> nized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guarantee against the deprivation of property without due process of law, or against the taking of private property for public use without compensation."

In the instant case the appropriation of the Spur not only did not cause the claimants any damage but was, as the Appellate Division found, "a benefit to the claimants" (R. 288; 229 App. Div. at p. 620).

C. The easements of light, air and access upon the removal of the Spur structure pursuant to the condemnation decree reverted in their full integrity to the abutting property owners without in any manner being encumbered by the rights theretofore acquired by the Manhattan Co. to impair said easements, for the franchise to maintain the Spur *was limited to railroad purposes* (Laws 1875, Ch. 606).

This is true even if it be assumed that the Manhattan Co.'s rights to impair these easements be deemed easements to which the abutting owners' easements of light, air and access were servient. (*Harris, et al.* v. *Elliot,* 10 Peters (U. S.) 25 at pp. 55 & 56; *Heard* v. *City of Brooklyn,* 60 N. Y. 242; *Strong, et al.* v. *City of Brooklyn,* 68 N. Y. 1; *Wash. Cemetery* v. *P. P. & C. I. R. R. Co.,* 68 N. Y. 591; *Crouch* v. *State of New York,* 218 App. Div. 356; *Scheer* v. *L. I. R. R. Co.,* 127 App. Div. 267; *Brooklyn, Queens Co., et al.* v. *Bird,* 76 Misc. 62, aff'd 152 App. Div. 932; *Bell* v. *Mattoon Water Works etc. Co.,* 245 Ill. 544; 19 Ann. Cas. 153.)

In *Heard* v. *City of Brooklyn, supra,* a railroad company had obtained from the Legislature authority to appropriate lands for railroad purposes and in the exercise thereof had acquired a strip of land adjoining a certain avenue. Subsequently the defendant decided to widen the avenue and received from the railroad company a deed to so much of its right of way, stripped of the tracks, as was needed to bring the avenue to the desired width. The plaintiffs, as successors in interest to the parties from whom the railroad company had secured the right of way, brought ejectment proceedings and the Court of Appeals held that the complaint alleged a good cause of action. The court, in referring to the condemnation proceedings taken pursuant to the statute under which the railroad company was chartered, said, page 246:

> "* * * that company became entitled only to the use of the land for the purpose of operating its railroad. The fee remained in the original owners, subject only to that use, and on the discontinuance of the use, the owners were entitled to resume possession of the land."

The *Heard* case was before the court again under the title *Strong et al.* v. *City of Brooklyn, supra,* where the court affirmed the judgment of ejectment. The court there stated, page 11:

> "The city here seeks to keep up the proprietary interest once held by the railroad company in these lands. It will not do, as is done by the defendant, in one breath to say that by the conveyance from the railroad company, that proprietary interest has ceased, and the premises are now held only as a public street; and in another, we need not pay you as owner of the fee any compensation for

> taking your lands for use as a public street, for we have acquired the right to them which was in the railroad company, for which you have been paid."

The law is well summarized in *Crouch* v. *State of New York, supra,* where an easement over the plaintiff's property was acquired for railroad purposes by condemnation proceedings and thereafter appropriated by the state for canal purposes. The court in holding that upon the cessation of the use of the land for railroad purposes the title reverted to the plaintiff and that he was entitled to recover damages from the state, said, page 362:

> "If the owner of such an easement abandons the property, sells it or devotes it to some purpose foreign to that for which it was acquired, *or if it is condemned or appropriated for a new public purpose,* the owner of the reversion may assert his right to possession or claim compensation. (*Heard* v. *City of Brooklyn, supra; Strong* v. *City of Brooklyn, supra; Hooker* v. *Utica & M. T. R. Co.,* 12 Wend. 371; *People* v. *Lawrence,* 54 Barb. 589, 619; *Porter* v. *International Bridge Co.,* 200 N. Y. 234; *Mechanicville & Ft. Edward R. R. Co.,* v. *Fitchburg R. R. Co.,* 103 Misc. 46; affd., 190 App. Div. 887; *Harris* v. *Elliott,* 10 Pet. 25; *Newton* v. *Manufacturers' R. Co.,* 115 Fed. 781, 786; 2 Nichols Em. Dom. (2d ed.) 1418.)" (Italics ours.)

D. It will be noted that the claimants' contention with respect to the inadequacy of the award for the Manhattan Co.'s so-called easements, that is, the right to impair with impunity the easements of light, air and access of abutting property owners, is based on the alleged rights of the claimants to continue to operate at a heavy financial loss to them-

selves the Spur, which had been judicially determined to be no longer necessary and convenient to the public service and to constitute an impediment and obstruction to the public use of the street. *What value could such rights have? They manifestly could not exist without the Spur or survive the removal of the Spur structure.* The claimants' position clearly is that the Spur had a "nuisance value" for which they are entitled to be compensated, though doubtless they will disown the phrase and deny its appropriateness. That this is in reality their claim cannot be gainsaid *for the claimants presented no evidence of the value of these rights possessed by them to impair the abutters' easements as annexed to the Spur as a going concern operated at a loss, but only adduced evidence tending to show that the properties abutting the Spur increased in value at least $3,600,000* upon the removal of the Spur structure from the street, which amount claimants maintained is the value of the rights they had acquired to impair the easements of the abutting property owners (R. Ex. A-X, 854, 864-6). The claimants paid something less than $266,494.99 for these rights (R. 319, Ex. B-X).

They predicate the valuation of these rights not on their actual value to the Manhattan Co., which was *nil*, but on the amount of the nuisance damage the Spur structure was presumed to be causing the abutting property owners—that is, the estimated amount the abutting property owners would pay, or, rather, the amount the claimants believe these owners should have been willing to pay to extinguish claimants' rights to impair their easements by the maintenance of the Spur structure in front of their properties (R. Ex. A-X 858-9, 866).

It is perfectly obvious that there is no merit to the claim made by these claimants that they should be paid a huge sum of money, or any other sum, for

rights which had no value whatsoever to the Manhattan Co., for under the claimants' theory the value of these rights depended principally, if not entirely, upon the enterprise and initiative of the abutting property owners or the lack of it; that is to say, in either developing their property or letting it remain unimproved. Under claimants' theory of damage, if an owner left his property unimproved there would be little or no value in claimants' so called easements in relation to that property even if the Spur were operated at a profit, while if another owner developed and improved his property by erecting a valuable building thereon the claimants' rights in relation to this property would become very valuable, not because the Manhattan Co. did anything to improve the value of those rights or contribute to the value of this improved property, for it would have done no more for that property than it did for the property left idle and unimproved, but because the owner improved his property despite the existence of the Spur structure in the street. We respectfully submit the statement of claimants' theory of valuation of the rights to impair the easements of abutting property owners carries its own refutation.

As stated by Judge Hough in *Consolidated Gas Co.* v. *City of New York,* 157 Fed. 849, "nuisance value" is so obviously illegitimate as to require no discussion. He stated in that case, page 874:

> "I can imagine no more than three ways in which the value of a franchise can be stated. It is valuable; (1) Because it authorizes the gainful use of private property in a particular manner; (2) because once obtained it is often difficult or impossible to get another like it; and (3) *because it may be used to injure or*

> *hinder another enterprise, although itself conferring or securing nothing of value.* The third method of statement has been accurately, though colloquially, described as 'nuisance value' *and is so obviously illegitimate as to require no discussion.*" (Italics ours.)

E. The Manhattan Co.'s franchise to construct and maintain the Spur, together with the so-called easements to impair the abutting owners' easements of light, air and access, in effect, became extinguished upon the judicial determinations that the Spur structure was no longer necessary and convenient for the public service and constituted an impediment and obstruction to the public use of the street and that the Spur was operating at a loss of many thousands of dollars annually. (*Southern Ry. Co.* v. *City of Memphis,* 97 Fed. (C. C. A. 6th Cir.) 819; *In re Oak Leaf Coal Co.,* 225 Fed. 126; *Grafton* v. *Moir,* 130 N. Y. 465, at p. 470; *Central Wharf* v. *Indian Wharf,* 123 Mass. 567; *Atl. & W. C. R. Co.* v. *Way et al.,* 172 N. C. 774, 90 S. E. 937; *Chicago & N. Y. Ry. Co.* v. *Sioux City Stockyards,* 176 Iowa 659, 158 N. W. 769; *California & N. R. Co.* v. *McCartney,* 104 Cal. 616, 38 Pac. 448; 19 C. J. 954, Sec. 172 (Easements).)

The law is summarized in 9 R. C. L. page 815 (Easements):

> "71. *Completion of Purpose.*—When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted the easement is extinguished. Hence if an easement is not granted for all purposes, but for a particular use only, the right continues while the dominant tenement is used for that purpose, and ceases when the specified user ceases."

In *Southern Ry. Co.* v. *City of Memphis, supra,* the Circuit Court of Appeals affirmed a judgment of the lower court denying an injunction to restrain the defendant city from removing plaintiff's railroad tracks from a city street and dismissed plaintiff's bill. The city franchise to the plaintiff provided that the cars on the line in question should be "drawn by horse or other animal power". The plaintiff found after it had laid its tracks in the street that owing to the grade the cars could not be operated with horse or other animal power as required by the franchise. The city, to protect the residential section through which the line passed, refused to permit the plaintiff, except for a short time, to operate the cars by dummy steam engines. Plaintiff admitted that the franchise restricted to animal power was valueless to it and that the track was maintained solely with the hope that the city might at some time consent to the use of some other power. The court said at page 821:

> "If, under such circumstances, the right to continue the maintenance of the track upon the street exists, it is a barren right to maintain an obstruction in the public street which is of no possible beneficial use to the grantee, and which is only maintained in the hope that the terms upon which the easement was originally granted may in some future time be so modified as to make its operation practicable."

Page 822:

> "Without regard to any question of abandonment by nonuser, the impossibility of enjoying the easement granted operates to bring it to an end through the inherent limitation of the grant itself. It is like an easement granted

for a particular purpose. *If that purpose cease to exist,* or its enjoyment become impossible, the grant is at an end. Thus, where there was a reservation of a right of way over flats appurtenant to uplands, for water craft, to and from a dock or wharf, the easement was held to be extinguished by the subsequent construction by the city of a public street between the plaintiff's upland and the dock, which made access to the dock and deep water impossible. *Mussey* v. *Proprietors,* 41 Me. 34. In *Manure Co.* v. *Donald,* 4 Hurl. & N. 8, an easement to take water for the use of a canal was held to cease when the canal was converted into a railroad. Pollock, *C. B.,* in that case stated the principle thus:

> 'If an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement.' "

The court, after referring to other authorities, said, page 823:

> "It matters little, in principle, whether the easement as originally granted was incapable of enjoyment for the purposes intended, or whether by change in conditions its exercise became impossible. The track, as a mere accessory to the principal right, is incapable of enjoyment, *is an obstruction to the public street,* and equity will not interfere to prevent its removal." (Italics ours.)

The principles enunciated in the *Southern Ry. Co.* case are clearly applicable to the instant case for here it has been adjudicated that the purpose of the franchise to operate the Spur has ceased to exist; that the Spur is no longer necessary and convenient

for the public service and that the structure constitutes an impediment and obstruction to the public use of the street (R. Ex. A-X, 1101). In this connection it should be borne in mind that the Manhattan Co.'s franchise was granted on a then existing necessity and convenience to the public (Laws 1875, Ch. 606, Sec. 4, and R. Ex. A-X, 1242 *et seq.*, 1877).

F. When property is appropriated for public use, in determining the amount of damages *the question is not what has the taker gained, but what has the owner lost.* (*Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, at p. 76.)

In the *Boston Chamber of Commerce* case the City sought to acquire title to land for street purposes. The title to the land in question was in the Chamber of Commerce, subject, however, to an easement of light and air in the Central Wharf Co., an adjoining owner. The court held that the claimants in that case were not entitled to have their damages assessed in a lump sum and that the City could not be required "to pay for a loss of theoretical creation, suffered by no one in fact." Holmes, *J.*, writing for the court, said in referring to the Fourteenth Amendment of the federal constitution, page 195:

> "It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. *And the question is what has the owner lost, not what has the taker gained.*" (Italics ours.)

As we have hereinabove shown, the claimants' so-called easements had no value to them upon the condemnation and removal of the Spur. Manifestly the foregoing case clearly establishes that there is no basis in fact or law for the claimants' contention that they should be entitled to recover the amount their witnesses testified that the abutting owners should be willing to pay for the removal of the Spur structure and the extinguishment of the rights of the Manhattan Co. to impair their easements.

It is well settled by numerous decisions of this court that just compensation to an owner when property is appropriated is *the value* of the property taken *at the time* of the taking. (*Olson* v. *United States,* 292 U. S. 246, 255; *Vogelstein & Co.* v. *United States,* 262 U. S. 337, at p. 340; *United States* v. *New River Collieries Co.,* 262 U. S. 341, at p. 344; *Jacobs* v. *United States,* 290 U. S. 13; *Monongahela Navigat'n Co.* v. *United States,* 148 U. S. 312, at p. 341; *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, at pp. 80-81; *United States* v. *Rogers,* 255 U. S. 163, at p. 169.)

G. The claimants are entitled only to the fair market value of the property appropriated "for all available uses and purposes", and are not entitled to be paid for any speculative value, nor are they entitled to any compensation for any element resulting subsequently to or because of the taking. (*United States* v. *Chandler-Dunbar Co., supra; Olson* v. *United States, supra.*)

The claimants' theory of damage for the extinguishment of their so-called easements or rights is clearly predicated upon the element resulting because of the extinguishment of those easements, that is, the enhancement in the value of the abutting property.

The foregoing authorities clearly show that the claimants are not entitled to any damage on this basis.

In *United States* v. *Chandler-Dunbar Co., supra,* the court said, page 80:

> "But in a condemnation proceeding, the value of the property to the Government for its particular use is not a criterion. The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." (Citing numerous authorities.)

In *Olson* v. *United States, supra,* the court said, page 255:

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined."

And at page 256:

> *"But the value to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking."*

And at page 257:

> "Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value —a thing to be condemned in business transactions as well as in judicial ascertainment of truth. (*Cf. Minnesota Rate Cases, supra,* p. 452. *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S.

133, 152. *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 319.)." (Italics ours.)

Under the terms of the 999-year lease between the Interborough Co. and the Manhattan Co. the former agrees to pay, and guarantees the holders of the stock of the Manhattan Co. 7% on their stock holdings. Neither the Manhattan Co. nor its stockholders under the lease are entitled to receive any percentage or part of the Manhattan Co.'s earnings or receipts as such (R. Ex. A-X 1150-1): If traffic shall be diverted from the Manhatan Co. to the Interborough Co., as the claimants contend, the former would suffer no loss. Neither the remote possibility that circumstances might arise for the cancellation of the lease nor that the traffic on the Spur might have increased in the future is a ground for awarding damages to the claimants as shown by the law enunciated in *Olson* v. *United States, supra.*

II. The courts below clearly erred in awarding the claimants $539,117.41 which amount is based upon the estimated original cost of the Manhattan Co.'s rights to impair the easements computed upon the values judicially determined at the time the rights were acquired, for the owner of property, upon its appropriation, is not entitled to the cost of the property but only to the value at the time of the taking (*Olson* v. *United States, supra; Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, at p. 123), and it is quite immaterial that in the instant case the Manhattan Co. may have paid taxes on its so-called easements.

In *Olson* v. *United States, supra,* the court in holding that the owner of the property upon its appropriation was entitled to the market value of the

property at the time of the taking contemporaneously paid in money, said, page 255:

> *"It may be more or less than the owner's investment.* He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him.
>
> * * * He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. *It is the property and not the cost of it that is safeguarded by state and federal constitutions. Minnesota Rate Cases,* 230 U. S. 352, 454." (Italics ours.)

Conclusion.

In conclusion we submit that damages to be awarded in a condemnation proceeding cannot be predicated on any element resulting from the taking.

In the case at bar petitioners' theory that abutting property owners would pay a certain amount to take down the elevated structure, and that the Manhattan Co. could have agreed to such removal for a consideration, presupposes the condemnation, for until that was started following the finding of the Public Service Commission as to public convenience no longer requiring the maintenance of the Spur structure, the Manhattan Co. was under obligation to run the elevated railway, and failure to do so woud *ipso facto* result in loss of its right to further obstruct light, air and access of the abutting property owners. Therefore, clearly prior to the condemnation the Manhattan Co. had nothing of value to sell, because, as shown above, the rights which the Manhattan Co. acquired to obstruct light, air and access were only for the

purpose of running an elevated railroad, with a right of reversion in the owners of the abutting property of the right to obstruct their light, air and access in the operation of the elevated railway.

Moreover, the payments made by the Manhattan Company when it acquired the right to obstruct the light, air and access of abutting property owners, was not for a perpetual right to obstruct light, air and access with an elevated structure, but only during the operation of the elevated railroad, and by the structure then erected, and not even by an elevated third track addition.

To have acquired a right such as the Manhattan Company claims it owned at the time of the condemnation (had it had the right to acquire such right, which of course it never had) it would undoubtedly have had to acquire title to the abutting property, so that it is now seeking to enrich itself by claiming value based on a more extensive right than it acquired and paid for.

Furthermore, the evidence offered to sustain its theory (which petitioners incorrectly refer to in many places in their brief as proven facts or uncontroverted or undisputed facts) is admittedly based on no consideration of the right to obstruct light, air and access, being coupled with an obligation to operate an elevated railway (R. Ex. A-X, pp. 858-60, 866). There is, therefore, no evidence in the case of what the only rights which the Manhattan Company had, which it could assign, could have been sold for. This was manifestly due to the fact that as the Spur was being operated at a loss, no one would pay anything for the right to obstruct light, air, and access for the sole purpose of running an elevated railway.

Had the Manhattan Company possessed the right to maintain an elevated structure, disassociated with

the operation of an elevated railroad, as for instance to display advertising signs or to accommodate traffic, such as a speedway, and the right to retain the elevated structure after operation of the Spur should cease, there might be some basis for the arguments petitioners make, but unfortunately for petitioners, the nature of the rights acquired by the Manhattan Co. were limited to rights incident to the operation of an elevated railway, and have been so construed by the New York courts, and as shown above, such construction is not reviewable by this court.

The judgment should be affirmed, with costs to the respondents.

Respectfully submitted,

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and
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FILE COPY

The 42nd Street Spur Case.

Office Supreme Court
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CHARLES ELMORE CRO

IN THE

Supreme Court of the United States

No. 546—October Term, 1934.

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, and others,
Petitioners,

against

THE CITY OF NEW YORK, *et als.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR BOWMAN BILTMORE HOTELS CORPORATION (Hotel Commodore), THE BOWERY SAVINGS BANK, THE MANHATTAN STORAGE AND WAREHOUSE COMPANY, ONE TWENTY PARK AVENUE REALTY CORPORATION (property now owned by The Mutual Life Insurance Company of New York), CARBIDE & CARBON REALTY CO., INC., VANDERBILT AVENUE BUILDING CORPORATION, D. A. SCHULTE, INC., JOHN CURRY REAL ESTATE, INC., J. CHR. G. HUPFEL CO., INC., ROGERS PEET COMPANY, NEWS SYNDICATE CO., INC., F. & S. ROCKAWAY RESTAURANT INC., R-W REALTY COMPANY, INC., CLARA L. NORTH and ELLA BLACKBURN, Trustees of the Estate of James Kelley, Deceased, CHILDS COMPANY, J. CHR. G. HUPFEL, J. HOMER CUDMORE, ANAHMA REALTY CORPORATION and WILLIAM VOLK, *Respondents.*

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Reported Below:

265 N. Y. 170, 192 N. E. 188.

IN THE

Supreme Court of the United States

No. 546—October Term, 1934.

William Roberts, as Receiver of the Manhattan Railway Company, and others,

Petitioners,

against

The City of New York, *et als.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief for Bowman Biltmore Hotels Corporation (Hotel Commodore), The Bowery Savings Bank, The Manhattan Storage and Warehouse Company, One Twenty Park Avenue Realty Corporation (property now owned by The Mutual Life Insurance Company of New York), Carbide & Carbon Realty Co., Inc., Vanderbilt Avenue Building Corporation, D. A. Schulte, Inc., John Curry Real Estate, Inc., J. Chr. G. Huppel Co., Inc., Rogers Peet Company, News Syndicate Co., Inc., F. & S. Rockaway Restaurant Inc., R-W Realty Company, Inc., Clara L. North and Ella Blackburn, Trustees of the Estate of James Kelley, Deceased, Childs Company, J. Chr. G. Huppel, J. Homer Cudmore, Anahma Realty Corporation and William Volk, Respondents.

Opinions Below.

The opinion of the Court of Appeals of New York (R. 410) is reported in 265 N. Y. 170. The Appellate Division, First Department, affirmed without opinion (238 App.

Div. 832; R. 407-408) the decision of the Trial Court by Mr. Justice Ingraham (adopting the opinion of Mr. Justice Mullan) which is reported in 143 Misc. 129 (R. 341). Mr. Justice Mullan's opinion is reported in 141 Misc. 565 (R. 331-340). Prior decisions of the Appellate Division and Trial Court in this controversy are reported in 229 App. Div. 617 (R. 283) and 126 Misc. 879 (R. Ex. AX, 1933-1985).

Statement of the Case.

The brief of the City of New York herein is hereby concurred in and inasmuch as the same contains a full statement of facts no extended statement is made in this brief.

This cause had its origin in a condemnation proceeding, begun in 1923 pursuant to a special Act of the New York Legislature, L. 1919, c. 611, as amended by L. 1923, c. 635. The condemned property was an elevated railroad spur, two blocks long, located in East 42nd Street, New York City, between Third and Park Avenues (hereinafter referred to as the "Spur"), built in 1877 and after due hearing adjudged by the Public Service Commission of the State on April 22, 1921 (R. Ex. AX, 1096)‡ to be "no longer necessary or convenient for the public service" and to constitute "an impediment and obstruction to the public use of the street" (Opinion below, R. 410, 411, 265 N. Y. 170, 178).*

---

‡ On the retrial conducted pursuant to the decision in 229 App. Div. 617, the record in the former trial was introduced in evidence and marked "Exhibit A-X." It fills four volumes of the record now on file in this Court, and is herein called for convenience "R. Ex. AX."

* For the opinion of the Public Service Commission see 12 P. S. C. Rep. (1st Dist. N. Y.) 58. An excerpt from this opinion will be found in the "Appendix B," hereto.

In that proceeding, the Commission also found that "the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street, caused by the development of that section, and it is securing it without any assistance whatever from the Spur, where traffic is actually on the decline" (Opinion of Commission, quoted in "Appendix B," *post*, pp. vi-viii). In addition, the Court found that the removal of the Spur would actually result in a benefit to the petitioners herein (R. 414, 265 N. Y., at p. 182), and that "it was their desire to escape the maintenance and operation of the Forty-second Street Spur" (R. 411, 265 N. Y., at p. 178).

This determination of the Public Service Commission, which antedated the condemnation proceedings, the Manhattan Railway Company, owner of the Spur, made no effort to have reviewed, although under State law a writ, or order, of certiorari to the Appellate Division of the Supreme Court was a readily available and adequate remedy. See Code of Civil Procedure, §§2120 *et seq.*, the statute in force in 1921; and see *People ex rel. New York & Queens Gas Co.* v. *McCall*, 219 N. Y. 84, 89 (1916), aff'd 245 U. S. 345 (1917).

It was thus a structure already moribund (by virtue of the Public Service Commission's determination) which the City of New York proceeded to condemn.

Thereafter this proceeding was instituted on September 30, 1921 by the City of New York to acquire title to the elevated railroad structure, tracks, stations, platforms, stairways and appurtenances of the Manhattan Railway Company in East 42nd Street, in the Borough of Manhattan, City of New York, constituting the 42nd Street Spur, and to acquire the right to extinguish all rights,

easements, etc., to construct, maintain and use said structure, tracks, etc. and to remove the said structure from the street.

Title to the property became vested in The City of New York on December 7, 1923, by virtue of a resolution of the Board of Estimate and Apportionment, adopted on November 23, 1923 (R. Ex. AX, 89).

The City owns the fee to the land in the bed of East 42nd Street in trust for street purposes (R. Ex. AX, 1065; 229 App. Div. 617, 620).

The respondents are all property owners within the area of assessment involved in this proceeding.

The petitioners William Roberts, as Receiver of the Manhattan Railway Company, the Manhattan Railway Company, Interborough Rapid Transit Company, Central Hanover Bank and Trust Company, as Trustee, and the Chase National Bank of the City of New York, as Trustee, are all Claimants.

The Manhattan owned lines are operated by Interborough under a 999 year lease. Both Manhattan and Interborough are in receivership.

The entire cost of acquiring the condemned property is borne by the property owners within the area of assessment extending from Thirty-fourth Street to Fiftieth Street and from Fifth to Second Avenues, as determined by the Board of Estimate and Apportionment of the City of New York (R. Ex. AX, 88).

Of the total award made by the New York Courts in this proceeding, about 37% is assessed upon the property of the above-named respondents herein.

The cause was first tried at an extraordinary Special Term of the New York Supreme Court (Mr. Justice James

O'Malley presiding) which by a final decree, dated February 28, 1928, made an award in favor of the Petitioners viz:

(1) $120,438 for the physical structure of the Spur (R. Ex. AX, 1984).

(2) $25,000 for the franchise to build, maintain and operate the Spur and the right of occupation in the street (R. Ex. AX, 1980).

(3) $750,000 for the rights to impair the abutting property owners' easements of light, air and access (R. Ex. AX, 1982).

(4) $80,000 for the cost of reconstruction and alteration of the elevated station at East 42nd Street and Third Avenue made necessary by the removal of the Spur (R. Ex. AX, 1984).

Cross appeals were then taken by all parties to the Appellate Division, First Department, which reversed the final decree of Mr. Justice O'Malley except as to the item of eighty thousand dollars, holding that the physical structure should be valued as scrap, that the franchise was of no value and that the value of the rights to impair the abutting property owners' easements of light, air and access should, upon a new trial, "be valued at the time of taking at not less than upon the basis judicially determined as their value at the time of their acquisition" (1888-1904) (Opinion R. 301, 305; 229 App. Div. 617, 628).

A second trial was then had before Mr. Justice George V. Mullan who rendered an opinion reported in 141 Misc. 565 (R. 331) and prepared a tentative decree but died before signing the final decree.

Upon a retrial before Mr. Justice Phoenix Ingraham, upon the same testimony, exhibits and rulings (R. 182) he

adopted the opinion of Mr. Justice Mullan (R. 341, 143 Misc. 129), and made a final decree awarding the claimants:

(1) $235 for the physical structure of the Spur, conceded to be its scrap value (R. 331; 141 Misc. 565, 567).

(2) $539,117.41 for the rights to impair the abutting property owners' easements of light, air and access (R. 340).

(3) $80,000 for the cost of the reconstruction and alteration of the elevated station at East 42nd Street and Third Avenue made necessary by the removal of the Spur (R. 340).

All parties then appealed from said decree to the Appellate Division, First Department, which unanimously affirmed the same without opinion (R. 388; 238 App. Div. 832).

Cross appeals to the Court of Appeals were then taken by the same parties pursuant to leave of said Appellate Division both from its final order entered March 24, 1933, affirming the decree of Mr. Justice Ingraham and from its intermediate order dated May 9, 1930, reversing the final decree of Mr. Justice O'Malley (R. 345-385). By a four to two decision the Court of Appeals on July 3, 1934, affirmed the order appealed from (R. 410; 265 N. Y. 170), but held that the decree of Mr. Justice O'Malley was not before it for review as it was not an intermediate order subject to review on this appeal (R. 413, 265 N. Y. 170, 180).

On September 13, 1934, a judgment on the remittitur from the Court of Appeals was entered in the New York Supreme Court (R. 427).

Thereafter the Petitioners by petition dated November 26, 1934 (No. 546, October Term, 1934), applied to the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of New York to review the judgment of said Court entered herein in the office of the Clerk of the County of New York on September 13, 1934, upon said remittitur of the Court of Appeals of the State of New York.

On January 7, 1935, the Supreme Court of the United States granted said writ of certiorari prayed for by the Petitioners, and on March 18, 1935, this Court denied a cross petition for such a writ on behalf of the above-named Respondents.

A chronology of events with regard to the beginning, duration and end of the Spur is hereto annexed as Appendix A.

Summary of Argument.

In order to avoid duplication, as briefs covering the other points relied on by the above named respondents are being filed on behalf of The City of New York and by other respondents, this brief is confined to three main points, which may be outlined, viz.:

The Petitioners are not entitled to any compensation for the rights to impair the abutting property owners' easements of light, air and access or for the franchise to construct, maintain and operate the Spur because (1) there was no "taking" of said rights and franchise in the constitutional sense, (2) said rights and franchise were worthless because the Spur was being operated at a loss, (3) the award therefor is in contravention of the rule laid down

in *Muhlker* v. *N. Y. & Harlem RR. Co.*, 197 U. S. 544, and (4) said rights and franchises were acquired for railway purposes only under the authority of the Rapid Transit Act of 1875 (see Appendix "C" hereto) which in effect limited their duration to such period of time as their exercise might be a matter of public convenience and necessity. Accordingly, said rights and franchises automatically ceased upon the finding and order of the Public Service Commission for the First District on or about April 22nd, 1921, determining that such operation was no longer a matter of public convenience and necessity, but on the contrary that the Spur constituted an impediment and obstruction to the public use of the Street, followed by the condemnation proceeding herein brought by the City of New York, which resulted in vesting title to the Spur in the City on December 7, 1923.

ARGUMENT.

I.

Petitioners are not entitled to any compensation for the rights to impair the abutting property owners' easements of light, air and access.

The Courts below awarded the Petitioners $539,117.41 for the rights to impair the abutting property owners' easements of light, air and access (hereinafter sometimes called the "so-called easements"), which under the ruling in *Story* v. *N. Y. Elevated R. R. Co.*, 90 N. Y. 122 (1882) the railway company was compelled to acquire in 1888-1904 from the abutting property owners as a condition pre-

cedent to the lawful operation of the elevated railway under its franchise.

In its opinion, the Court of Appeals stated (R. 412, 265 N. Y., at p. 180), viz.:

> "Quite apart from the discussion of the cases, it is clear that the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property. The railroad as such possesses a right to impair the easements by the operation of its road. If it did not have such rights it would be guilty of an injury to the inheritance."

It will thus be seen that the original acquisition was for the purpose of rendering lawful the operation of the elevated railway and for no other purpose (R. 301, 229 App. Div. 617, 628).

Accordingly, such rights automatically terminated when the operation of the Spur ceased. This is illustrated in the case of

Heard v. *City of Brooklyn*, 60 N. Y. 242.

In that case the plaintiff brought an action of ejectment for a strip of land 50 feet wide, forming the southerly portion of Atlantic Ave., Brooklyn.

By an act of the Legislature, a railroad company had been authorized to acquire land by condemnation proceedings *for the use* and *accommodation* of said railroad, and on payment of compensation the company was to "become entitled to the use of said land for the purposes aforesaid" (p. 243 of opinion).

Under this act the company acquired the use of a strip 80 feet wide by about 700 feet long, which included the land in question.

Subsequently, Atlantic Ave. was laid out 70 feet in width and included 30 feet of the northerly portion of said strip of 80 feet, leaving the 50 feet now claimed in the occupation of the company.

Thereafter, it was projected to widen Atlantic Ave. by including said adjoining strip of 50 feet and an act was passed by the Legislature authorizing the railroad company to cede the same to the City of Brooklyn for a public street. In due course a deed was executed conveying this property to the City, and the company thereupon removed its tracks and the City entered and constructed the street.

In reversing the General Term of the Supreme Court, Second Department, the Court of Appeals (p. 246 of opinion) held that the

> "[railroad] company became entitled only to the use of the land for the purpose of operating its railroad. The fee remained in the original owners, subject only to that use, and on the discontinuance of the use, the owners were entitled to resume possession of the land."
>
> "This reversion was a valuable interest in the land, of which the owners could not legally be deprived without compensation."

The opinion (p. 247) then goes on to state that where the whole fee has been acquired the original owner has no reversionary or other interest in the land.

> "But it is otherwise when land has been taken for a *particular use* only, and that use is discontinued and abandoned" (italics ours).

Accordingly, it was decided that the City derived no title as against the plaintiffs, from the conveyance by the railroad company, or the legislative acts authorizing that

conveyance, for the *particular use* having been discontinued, the property reverted to the original owners, of whom plaintiffs were admitted to be the representatives (pp. 247-248 of opinion).

Similarly in the instant case, the Railway Company acquired for *railroad purposes only*, the rights to impair the abutting owners' easements of light, air and access, and when the use was discontinued and the Spur removed, those rights reverted to the *original* owners and their successors in interest, so that there was nothing left to vest in the City of New York. In other words, the Railway Company, and its successors, received just what it paid for and should be given nothing more.

Under the law of New York, therefore, the Petitioners are not entitled to any compensation for said rights to impair.

The force of the *Heard* decision was perceived by the Court below, for they said (R. 413-414, 265 N. Y., at p. 181):

> "That these easements would be worth $3,600,000 to the abutting owners if they now owned them is beside the point. What is the city taking from the railroads? That is the question."

In so analyzing the case, the Court below was merely following in the footsteps of Mr. Justice Holmes, who in speaking for this Court in *Boston Chamber of Commerce* v. *City of Boston*, 217 U. S. 189 (1910), said (p. 195):

> "And the question is what has the owner lost, not what has the taker gained."

What the owner in this proceeding lost may be fairly stated in the language of the Appellate Division in its opinion (R. 288, 229 App. Div. 617, 620):

> "Upon this record it is fair to say that the cost of the operation of the spur exceeded by many thousands of dollars yearly the revenue therefrom, and that the taking by the City of the spur was a benefit to the claimants."
>
> • • • • • • • •
>
> "We find, therefore, that *these rights should be valued at the time of taking* at not less than upon the basis judicially determined as their value at the time of their acquisition" (R. 301; 229 App. Div. 617, 628; italics ours).

In other words, in spite of the fact that the Petitioners lost nothing the Court decided to give them $539,117.41 of the property owners' money, although the frontage of 1698½ feet opposite the Spur was burdened with the encumbrance thereof for a period of twenty-five years at a yearly cost per front foot to the Petitioners of about $6.

Apparently Chief Judge Pound, though conceding in his opinion that the City's argument that the rights to impair the easements were not compensable at all "has some logical force" (R. 413, 265 N. Y., at p. 181), nevertheless felt that substantial justice required compensation in some measure to be paid. He accordingly declared (R. 413, 265 N. Y., at p. 181):

> "• • • the city should reimburse the railroads for what it cost them to acquire such easements when it terminates the right of use in perpetuity."

The learned Judge did not spell out the source of the duty behind the phrase "should reimburse". As we pointed out *supra*, page 11, citing *Heard* v. *City of Brooklyn*, the duty positively did not exist—on strictly legal considerations. The railway company bought an evanescent kind of property, as it well knew. That which precipitated and completed the process of evanescence was a determination

of the Public Service Commission, which the railway company elected not to review but to accept.

Nevertheless Chief Judge Pound thought that *ex aequo et bono* the City should pay something.

The Railway Company paid for the rights acquired by judicial determination $175,199.99 and for rights acquired by voluntary settlements $91,295, making a total of $266,494.99, whereas the New York Court actually awarded for all of these rights, including those acquired by prescription, the sum of $539,117.41, an excess of $272,622.42 over their cost to the Railway Company without making any deduction for the damages to abutting property from the time of the acquisition of these rights by the Railway Company to the time of the removal of the Spur (R. 319, 340).

Furthermore, in the case of rights acquired by voluntary settlements which included past as well as future damages, no separation could be made so that the railway companies were reimbursed not only for the amount paid for the rights to impair in future but also for the past damages paid by them at the time of the acquisition of the rights to impair, thus making the excess over cost considerably greater than the amount above specified.

At page 181 of its opinion (R. 414; 265 N. Y. 170) the Court of Appeals stated viz:

> "It, therefore, acquired no real title to these easements apart from the operation of its road. They otherwise still attach to the property of the abutting owners."

Accordingly, the Railway Company acquired no easements which it could sell or use for other than railway purposes.

As the Spur was being operated at a loss the rights to impair were of no value for railway purposes, and since they could not be sold for other purposes they had no value whatsoever so that the New York Court in making an award for them to the Petitioners on the quasi-contractual theory of preventing unjust enrichment gave the Petitioners something to which they were not legally entitled.

Throughout their brief the Petitioners assume that the franchise and rights to impair easements acquired by the Railway Company were in perpetuity, whereas an examination of the statutes and proceedings under and pursuant to which the same were acquired will demonstrate that their life was limited to the period during which their exercise was a matter of public convenience and necessity.

Since the Spur was constructed pursuant to the provisions of the Rapid Transit Act of 1875, Chapter 606, Laws of New York, 1875 (R. Ex. AX, 1941; 265 N. Y. 170, 179), the powers of the Railway Company to acquire property must be measured by the authority granted thereby.

An examination of the statute will disclose that the acquisition of property by said Company was limited to railroad purposes (see Sections 17, 18, 19, 20, 22, 25 and 26). In the case of voluntary grants, Section 26, subd. 1, states that property acquired by voluntary grant shall be held and used for the construction, maintenance and accommodation of the railroad only.

Pertinent extracts from these Sections of the Rapid Transit Act will be found in "Appendix C" hereto, from which it will be noted that all that the Railway Company acquired by conveyance, judgment, condemnation and prescription was the right to impair these easements so long as the Spur was maintained and operated for rail-

road purposes. As the Appellate Division said (R. 301; 229 App. Div. 617, 628):

> "Considering as we must, that they [the rights in question] could only be used in connection with an elevated railroad or a kindred purpose. * * *"

In other words, the Railway Company acquired a qualified right, to wit, a limited right so long as the Spur was maintained and operated for railroad purposes with the right of reverter to the abutting owners of their unimpaired easements of light, air and access in case the Spur ceased to be used for such purpose.

This contention is recognized by the Appellate Division in its opinion (R. 296; 229 App. Div. 617, 625), viz:

> "As these so-called rights when acquired by the railroad were of no use to it, except as it was compelled to acquire them in order to operate pursuant to its franchise, it would naturally follow that such rights would expire with the cessation of the operation of the railroad."

Said Court then proceeded to value these rights upon the theory that (R. 295; 229 App. Div. 617, 625):

> "It would be unfair to the railroad to permit this value to be taken from it and added to the abutting property without compensation to the railroad."

The Railway Company may have unknowingly assumed in the first instance the hardship of compensating the abutting owners for the impairment of their easements (R. Ex. AX, 1978; 126 Misc. 879, 910), but that is no reason for making them a *present* of $539,117.41 when (1) the Railroad Company's rights only existed so long as the Spur was a subject of public convenience and necessity; (2) the rights

were worthless at the time the Spur was acquired because it was being operated at a loss; (3) the rights were limited to railroad purposes only and hence cannot be valued on any other basis.

Merely because damages may have been assessed in favor of the abutting owners without contemplating a right of reverter, is no reason for denying the existence of the same, if otherwise shown. The Railway Company received just what it paid for, namely, the right to impair these easements so long as the operation of the Spur was a matter of public necessity and convenience.

The opinion of the Appellate Division (R. 290, 296; 229 App. Div. 617, 621, 625) states viz:

> "Since the record shows that this Spur could no longer be operated except at a large annual loss and that the taking by the City was a distinct benefit to the claimants, * * * we cannot close our eyes to the fact that this condemnation is a present benefit to the railroad because, as noted, the operation of this Spur was unprofitable,"

and further (R. 302; 229 App. Div. 617, 628; italics ours):

> *"In the first place, no one today would acquire them* [the rights in question] *for the purpose of running an elevated railroad. This because of the changed city conditions, including the advent of the subway."*

Accordingly, there were no rights to impair said easements left in the Petitioners subsequent to 1921, which might be said to vest in the City on December 7, 1923, the date of vesting of title herein.

That the 42nd Street Spur was no longer a matter of necessity and convenience and that it constituted an impediment and obstruction to the public use of said street, was

conclusively determined by an order of the Public Service Commission of the First District, dated April 22nd, 1921, reading, in part (R. Ex. AX, 1101), viz (italics ours):

> "The Public Service Commission for the First District does hereby order and determine (1) that the tracks, structure, station and appurtenances of the Manhattan Railway Company in East Forty-second Street, in the Borough of Manhattan, City of New York, are *no longer necessary and convenient for the public service and constitute an impediment and obstruction to the public use of said street.* * * *"

This determination of the Public Service Commission was made pursuant to the provisions of Chapter 788 of the Laws of 1917, as amended by Chapter 611 of the Laws of 1919. The validity of these proceedings before the Public Service Commission and the constitutionality of Chapter 788 of the Laws of 1917 were questioned by the Petitioners at the Special Term on the application for the order of condemnation and on their appeal from the order of condemnation herein, dated July 18, 1923, and overruled by the Appellate Division, which affirmed without opinion the order appealed from (208 App. Div. 794).

No appeal was taken to the Court of Appeals from the Order of the Appellate Division affirming the order of condemnation.

Therefore, the order of condemnation made herein is final and conclusive.

Furthermore, this Court has held that the *Elevated Railroad Cases* decided by the Court of Appeals, established the law of the State of New York to be that the easement of light and air of abutting property owners in the streets of New York City above the street to be property and within

the protection of the Constitution for compensation in case of its diminution by an elevated railroad structure.

Muhlker v. *N. Y. & Harlem RR. Co.*, 197 U. S. 544.

Accordingly, the judgment in the case at bar, insofar as it awards the Petitioners the sum of $539,117.41 for the rights to impair these easements, in effect takes away from the abutting property owners the compensation theretofore paid them upon the acquisition of said rights.

In other words, as heretofore pointed out, the judgment below awards the Petitioners for said rights, which had become worthless, a sum $272,622.42 in excess of the amount paid to the abutting property owners for the same, thereby completely disregarding the doctrine of the *Elevated Railroad Cases*, held by this Court in the *Muhlker Case, supra*, to be a rule of property.

Hence, Petitioners are entitled to no compensation whatsoever for their limited rights to impair the abutting property owners' easements of light, air and access and accordingly, the Court below erred in making an award of $539,117.41 for these rights.

II.

Petitioners are not entitled to any compensation for the franchise to construct, maintain and operate the spur.

Respondents herein have persistently maintained with the City that the only property owned by the railroad in East 42nd Street, was the 42nd Street Spur, which consisted of the franchise, the elevated railroad structure and

the right to maintain it and operate cars and trains thereon free from interference and the right of interference by the abutting property owners.

It has also been maintained that since the Spur was not profitably operated (R. Ex. AX 1955), and further that it was operated at a large annual loss* (R. 290) it had no value other than scrap value of the structure.

With respect to the value of the franchise and elevated structure the Appellate Division held (R. 290), viz.:

> "The rights of the railroad in the street were strictly limited by the franchise which it had acquired from the City and State. Since the record shows that this spur could no longer be operated except at a large annual loss and that the taking by the City was a distinct benefit to the claimants, and the Public Service Commission, after proceedings and hearings, have determined and ordered that the spur was no longer necessary and convenient for the public service, it therefore follows that the right to run an elevated railroad in this street under these conditions was of no value.
>
> Under the same conditions we are unable to ascribe to the elevated structure value other than what it would be worth taken down."

The Court of Appeals said (R. 414):

> "It is difficult to see what the railroad has lost by the taking of its street franchise. It has gained relief from the burden of operating the road. What would any one pay for the franchise apart from the right to occupy the street? Should it receive more for its franchise when the spur can be operated only at a large annual loss? * * * the finding that the Forty-second street franchise had no value should not be disturbed.

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* In 1923, the date title vested in City, it was $24,017 (R., Ex. AX 607).

> Next comes the question of the award for the structures in the street. * * * The right to have the structure in the street was worthless if the street franchise was terminated. The structures had only a nuisance value when the right to have them in the street ended."

The franchise in this case to construct, maintain and operate the 42nd Street Elevated Spur had its source in the Rapid Transit Act of 1875 (Laws of 1875, chap. 606; Appendix C, *infra*). (265 N. Y. 179, R. 411.)

It has been the settled law of this State since the decision of this Court in the *Charles River Bridge Case*, 11 Peters 420 (1837), that franchises granted by the State or its agencies are to be strictly construed, and corporations to which the same are granted can take no implied rights as against the State or private individuals.

The Binghamton Bridge Case, 3 Wall. 51 (1865), reversing 27 N. Y. 87;

Auburn and Cato Plank Road Co. v. *Douglass*, 9 N. Y. 444 (1854);

Syracuse Water Co. v. *City of Syracuse*, 116 N. Y. 167 (1889);

Skaneateles Water Co. v. *Village of Skaneateles*, 161 N. Y. 154 (1899).

In the *Binghamton Bridge Case, supra*, DAVIS, J., in delivering the opinion of the Supreme Court of the United States, stated at page 75, viz.:

> "In the case of the Charles River Bridge, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, and that in grants by the public

nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts."

In *Auburn and Cato Plank Road Co.* v. *Douglass, supra,* plaintiff brought an action for an injunction enjoining defendant from permitting his road to be kept open so that it might be used by the public for travel in order to avoid plaintiff's toll gate. In construing the franchise granted by plaintiff's charter and holding that it could not be enlarged by implication so as to grant the privilege of exclusion on the different sides of the road, SELDEN, J., stated at pages 453-454, viz.:

"If then, as established by these cases, a corporation is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power, *a fortiori* should it not be permitted to encroach by implication upon the rights of individuals who are in no respect parties to the compact between the legislature and such corporation."

In *Syracuse Water Co.* v. *City of Syracuse, supra,* the question on which the case hinged was the construction of the franchise granted by the State to the plaintiff to supply the City of Syracuse with water.

In holding that the franchise did not confer an exclusive right upon the plaintiff, BRADLEY, J., used the following language at page 178, viz.:

> "Whatever support that rule may seemingly have in reason or propriety, it is not now available to that extent for the beneficial protection of the grantee in the exercise of his franchise, but, on the contrary, public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no farther than is expressly declared by the language employed for the purposes of their creation.
>
> The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the state in imparting to its citizens or corporations powers and privileges of public character. And, therefore, except so far as they are by the terms of the grant made exclusive, the power is reserved to grant and permit the exercise of competing and rival powers and privileges, however injurious they may be, to those taken by the prior grantee."

In *Skaneateles Water Co.* v. *Village of Skaneateles, supra,* the question of the exclusiveness of a Water Company's franchise was also involved. In holding that the same was not exclusive, Parker, Ch. J., used the following language in delivering the opinion of the Court at pages 165-166, viz.:

> "All franchises come from the State, although the legislature may, and often does, delegate to municipal authorities the right to take final action in the procedure resulting in the creation of a franchise (*Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513). The effect of such action, if within the

> legislative permission, is to allow the grantee to carry on the business authorized by the franchise. All rights not expressly granted by it are, as we have seen, reserved. The rights thus reserved include in part the granting of a franchise to another corporation to carry on the same business in the same territory. The power to grant the additional franchise, as well as the first one, the municipality acquires from the legislature, which has the power to determine whether the rights reserved upon the grant of a first franchise shall be exercised by a private corporation or by the municipal corporation."

Upon the foregoing authorities and for the reasons above stated, the Petitioners acquired the franchise in the present case for *railroad purposes only* so long as the operation of the Spur was necessary, and the Public Service Commission for the First District has duly determined that the same was no longer necessary and convenient for the public service, and constituted an impediment to the public use of East 42nd Street.

Accordingly, this franchise expired in 1921 by limitation of the terms contained in the Rapid Transit Act of 1875, in which it had its source as above stated, and when title vested in the City of New York herein there was no existing franchise entitling the Petitioners to compensation.

III.

There was no "taking" by the City of the Petitioners' rights to impair the abutting property owners' easements or the Petitioners' franchise to construct, maintain and operate the Spur.

As demonstrated in Point I, *supra*, there was no "taking" of the Petitioners' rights to impair the abutting property owners' easements of light, air and access, but a termination of said rights which is not a taking within the meaning of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Omnia Commercial Co. Inc. v. *United States*, 261 U. S. 502 (1923);
Mullen Benevolent Corp. v. *United States*, 290 U. S. 89 (1933).

In delivering the opinion of the Court in the *Omnia* case, *supra*, Mr. Justice Sutherland stated at page 508 (italics ours), viz.:

> "The contract in question was property within the meaning of the Fifth Amendment, *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 690; *Cincinnati* v. *Louisville & Nashville R. R. Co.*, 223 U. S. 390, 400, and if taken for public use the Government would be liable. But destruction of, or injury to, property is frequently accomplished without a 'taking' *in the constitutional sense.*"

In the case at bar, as in the cases above cited, the City did not take these rights from the Petitioners. At no time since the condemnation or removal of the Spur did the City have the right to obstruct or impair the light, air or

access of the abutting properties. Nor was there a taking by destruction, as in the case of a franchise. The fact is that no rights to impair easements remained when the right to operate the Spur terminated. These rights were not *perpetual,* but were from the beginning ineffective to continue without the railroad.

Assuming, however, that there was a "taking" of property, it was not a taking under the due process clause, but under state law. The situation is aptly described in the opinion below as follows (R. 412):

> "Quite apart from the discussion of the cases, it is clear that the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property. The railroad as such possesses a right to impair the easements by the operation of its road. If it did not have such rights, it would be guilty of an injury to the inheritance."

Assuming further that the Railway Companies had to pay damages in order to avoid trespassing on the abutting property, it does not follow that the termination of the right to trespass is tantamount to a "taking" of property *in the constitutional sense.* When the Petitioners set up a claim of right under the Constitution of the United States, to the effect that their property is being taken without due process, they must show that the taking is one cognizable under the Constitution. *Omnia Commercial Co., Inc.* v. *United States, supra,* and cases cited therein.

Since there was no "taking" of property in the constitutional sense, Petitioners are not entitled to any compensation for the termination of their rights to impair the abutting property owners' easements of light, air and

access and the Court below erred in awarding therefor the sum of $539,117.41.

Further Comments.

(1) The Petitioners contend in effect that the appreciation in value of property on 42nd Street, since the removal of the Spur, is evidence of the loss they have sustained.

In fact, however, it is direct evidence of the loss which the property owners have sustained in having the development of 42nd Street and its environs retarded for over 45 years prior to 1923, when the City took title to the Spur.

Had the Spur never existed and the roadway of 42nd Street at this point been left clear, the impulse for high buildings in this vicinity, of which the Court may take judicial notice, would have started years before it did, and these property owners have therefore lost without possibility of recovery the earlier increased value from the development of their property had it been allowed to progress without the intrusion of the Elevated Railroad in that Street, which became practically useless to fill its original mission after a few months existence.

Furthermore, when one considers that the Spur was operated at a loss, if there were any rights taken away from the Petitioners by the removal of the Spur, it is a case of *injuria sine damno.*

In other words, the award for easements for the operation of the Spur is contrary to all the fundamental principles of law and of equity.

(2) Throughout their brief, Petitioners reiterate that the New York Courts arbitrarily valued the rights to

impair the abutting property owners' easements of light, air and access *at the time of the original acquisition* of these rights, but an examination of the opinion of the Appellate Division pursuant to which the award was made will show that the rights were valued *at the time of taking* at not less than upon the basis judicially determined as their value at the time of their acquisition (R. 301, 229 App. Div. 617, 628).

The value at the time of acquisition was fixed as a minimum and inasmuch as the New York Courts were unanimous in holding that the Spur was being operated at a loss at the time of taking, this minimum was applied in order to prevent what said Courts believed would result in an unjust enrichment of the abutting property owners, for the rights obviously had no value for railway purposes at the time of taking, if still existent then, which respondents deny for the reasons heretofore stated.

(3) The Petitioners further endeavor to demonstrate that the Railway Company *acquired the easements* of light, air, and access of the abutting property owners and refer to prior decisions of the Court of Appeals in which the necessity of an accurate definition was not important. In the present case, however, the Court of Appeals correctly analyzed the situation and held in effect that what the Railway Company *acquired* was *the right to impair* the abutting property owners' easements of light, air and access and not the easements themselves (R. 412, 265 N. Y. at p. 180).

In other words, the Railway Company paid the abutting property owners compensation for past and future damages because of the impairment of their easements result-

ing from the operation of the Spur, and it did not acquire the easements of the property owners.

(4) The language from the opinion of the Appellate Division (229 App. Div. 627) quoted at the top of page 30 of Petitioners' brief shows the fallacy of the basis upon which any compensation at all was awarded to the Petitioners for these rights, because the fact that a party pays a substantial sum of money for property is no reason why he should be reimbursed the full amount thereof or more in condemnation proceedings if the said property is worthless at the time of taking.

(5) The proceedings before the Public Service Commission were had pursuant to the provisions of the special act for removal of the Spur (L. 1919, c. 611, as amended by L. 1923, c. 635) and, hence, under the Rapid Transit Act of 1875, the Commission's order was effective to terminate the intangible rights of Petitioners, although further proceedings in the Supreme Court were necessary to vest title in the City to the physical structure of the Spur.

(6) Similarly, Petitioners' contention that the determination of the Public Service Commission has no bearing on the question of the value of the Spur, is untenable, for the proceedings before this Commission were the basis for subsequent steps taken under the aforesaid special act, and if Petitioners did not acquiesce in the findings, they should have sought a review thereof.

(7) Taking the Petitioners' brief as a whole, it raises in the last analysis nothing more than a question of the *quantum* of compensation. A conclusive answer to Peti-

tioners' contentions is, therefore, found in the following decisions of this Court, viz.:

Appleby v. *City of Buffalo*, 221 U. S. 524, 532 (1911);

McGovern v. *City of New York*, 229 U. S. 363, 370-371 (1913).

(8) This Court has held in effect that where a question sought to be raised by the respondents was contested throughout the case and is a necessary element to be determined in fixing the damages claimed by Petitioners and closely related in substance to the case brought before the Court by the Petitioners it may be considered in connection therewith.

United Railways v. *West*, 280 U. S. 234, 253.

In the case at bar, the principal question before the New York Courts was, and before this Court will be, whether or not the Petitioners are entitled to compensation for the rights to impair the abutting property owners' easements of light, air and access. The Petitioners claim that the award of $539,117.41 is inadequate, while the above named respondents claim that it was excessive and that the Petitioners are entitled to no compensation for said rights.

Accordingly, if this Court considers this question, and comes to the conclusion that the rule of damages laid down by the New York Courts was erroneous and that the award is excessive, the judgment should be modified in favor of the above-named respondents by directions to eliminate or reduce the sum granted to the Petitioners by the New York Courts for said rights.

Conclusion.

In view of the foregoing, the judgment of the Supreme Court of New York should be modified in favor of respondents or affirmed, with costs.

Dated, April 1, 1935.

Respectfully submitted,

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Appendix A.

CHRONOLOGY OF SPUR.

1871 New York Elevated Company Incorporated under Railroad Act of 1850, Chap. 140, as amended.
(R. Ex. AX 1619, Vol. III.)

1875

June 18 Rapid Transit Act (Laws, Chapter 606) providing for the construction and operation of steam railways in the counties of the state: also for the appointment of 5 Commissioners with power to determine upon "the necessity of such steam railway or railways" and "exclusive power to locate the route or routes of such railways over, under, through or across streets, avenues, places or lands of such county" and (§5), to "decide upon the plan or plans of construction for such railway or railways", and (§7) "to prepare appropriate articles of association for the Company".

Oct. 29 Manhatan Railway Company Incorporated under Rapid Transit Act of 1875, Chap. 606. Laws of 1875.
(R. Ex. AX 1525 *et seq.*, Vol. III.)

1876 Construction Third Avenue Elevated authorized by Commissioners, approved under Rapid Transit Act and approved by General Term April 15, to be built by New York Elevated Railroad Company from Battery Place along various streets to the Bowery, thence along Third Avenue to East 42nd Street, "thence over, through and along East Forty-second Street to and across Fourth Avenue to *and connecting with the depot known as Grand Central,* occupied by the New York Central and Hudson River Railroad Company, the New York and Harlem Railroad Company, the New York, New Haven and Hartford Railroad Company"; also North of Forty-

second Street along Third Avenue to 129th Street.
(R. Ex. AX 1581-1588, Vol. III.)

1878 Aug. 26 — Third Avenue Elevated opened, as constructed by New York Elevated Railroad Company up Third Avenue from Chatham Square to 42nd Street, thence along 42nd Street connecting with the Grand Central Station.
(R. Ex. AX 296, Vol. I.)

1878 Dec. — Third Avenue Elevated opened north from 42nd Street to Harlem (R. Ex. AX 296, Vol. I.)
A few months thereafter the Spur was found dangerous to operate as a through line from Chatham Square and, as a result of some public action, was *discontinued as a through line* to Grand Central Station and operated with a shuttle service.

Later this physical *connection* between the Spur and *Grand Central Station* was *removed* and the Spur station at Park Avenue was entered only by stair ways from the street.
(R. Ex. AX 296-297, Vol. I.)

1879 — Approval Third Avenue Elevated as constructed from Battery Place to 129th Street by Rapid Transit Commissioners.
(R. Ex. AX 1589, Vol. III.)

1884 — Third Avenue Elevated structure leased by New York Elevated Company to Manhattan Railway Co. for 999 years.
(R. Ex. AX 1593, Vol. III.)

1890 — New York Elevated Railway Co. merged with Manhattan Railway Co.
(R. Ex. AX 1604, Vol. III.)

1902 — Interborough Rapid Transit Company Incorporated under Laws of 1890, Chap. 565.
(R. Ex. AX 1616, Vol. III.)

1903 — Interborough leases Third Avenue Elevated from Manhattan Railway Company for 999 years.
(R. Ex. AX 1139, Vol. II.)

1904 Interborough constructs Lexington Avenue Subway to 42nd Street, thence under 42nd St. to Broadway and up Broadway and Lenox Ave. North to 145th Street.
(R. Ex. AX 614, 669, Vol. II.)

1918 Interborough extends Lexington Ave. Subway north of 42nd St. to Harlem.
(R. Ex. AX 550, Vol. I.)

1921 Public Service Commission, successor to Rapid Transit Commissioners, under Laws of 1907, Chap. 429, determines that
"Spur no longer necessary and convenient for the public service and constitutes an impediment and obstruction to public use of said street."
(R. Ex. AX 1101, Vol. II.)

1923

Dec. 6 Transit Commission, successor to Public Service Commission, as to cities of over a million inhabitants (Laws 1921, Chap. 134, §4*a*) determines necessary alterations to be made at El Station at 42nd Street and 3rd Ave.
(R. Ex. AX 1204 *et seq.*, Vol. II.)

Dec. 7 City vests title to Spur.
(R. Ex. AX 989, Vol. II.)

1924 Removal of Spur completed.
May 22 (R. Ex. AX 986, Vol. II.)

Appendix B.

Excerpt from opinion of New York Public Service Commission, First District, in Matter of Manhattan Ry. Co. (Removal of 42nd Street Spur), 12 P. S. C. Rep. (1st Dist.) 58, at pages 68-69 (1921):

"The defense of the Manhattan Railway Company proceeds chiefly upon two grounds:

(1) That the spur will serve as a feeder to help the Third Avenue Elevated Railroad to secure part of the constantly increasing traffic in the Forty-second Street district; and (2) that in case of the cancellation of the existing lease of the Elevated Road to the Interborough Rapid Transit Company (which now operates the Elevated Road), and the resumption of operation of the Elevated Road by the Manhattan Railway Company, the latter company would lose its connection with Grand Central Terminal, and would thereby lose its share of the traffic to and from that Terminal.

I do not think that either of these contentions can be sustained.

In the first place, the record shows that although the Third Avenue Elevated Road is receiving direct benefit in traffic increase from the tremendous growth of the Forty-second Street District, nevertheless traffic on the Spur is actually decreasing.

In other words, ticket sales at Forty-second Street station of the Third Avenue line were:

in 1916	2,303,728
in 1920	3,339,140

or an increase of more than a million.

While, during the same period, ticket sales on the spur were:

in 1916	1,537,904
in 1920	1,524,427

During this same period, the record shows that ticket sales at other stations of the Third Avenue

line (such as 14th Street and 23rd Street) were practically stationary.

The conclusion to be drawn from the above is that the Third Avenue line is securing its full and fair share of the increased traffic at Forty-second Street caused by the development of that section, and it is securing it without any assistance whatever from the spur, where traffic is actually on the decline.

In the second place, the record shows that if this spur were removed, there would be a tremendous increase in building operations extending as far east on Forty-second Street as Third Avenue; that this would result in bringing many more people to that section, many of whom would for convenience use the Third Avenue line, and would supply a profitable short haul traffic. That the constant flow of people from these buildings to the Third Avenue line would turn much additional traffic in that direction is obvious. Accordingly, even if the lease of the elevated road to the Interborough Rapid Transit Company were to be cancelled (which seems to be a remote possibility), the removal of this spur would not cut the company off from the Forty-second Street district and would not deprive the company of its share of traffic from that district, but rather would extend that district so as to embrace Third Avenue, with much resultant benefit to the Third Avenue Elevated Railroad."

Appendix C.

EXTRACTS FROM RAPID TRANSIT ACT OF 1875.

(Italics ours.)

"SECTION 1. Whenever it shall appear, by the application of fifty reputable householders and taxpayers of any county in this State, verified upon oath before a justice of the Supreme Court, that there is *need* in such county of a steam railway or railways for the transportation of passengers, mails or freight, the board of supervisors of said county may, within thirty days after presentation to them of such application, duly verified as aforesaid, appoint five commissioners. * * *"

"SECTION 4. Said commissioners shall, within thirty days after such organization, determine upon the necessity of such steam railway or railways, and if they find such railway or railways to be *necessary* in such county, they shall, within sixty days after such organization, fix and determine the route or routes for such steam railway or railways. * * * the *determination of three commissioners,* appointed by the General Term of the Supreme Court in the district of the proposed construction given after a due hearing of all parties interested and confirmed by the Court, that such railway or railways *ought to be constructed or operated* be taken in lieu of the consent of such property owners."

"SECTION 17. Every such corporation shall have the right to acquire and hold such *real estate, or interest therein, as may be necessary to enable them to construct, maintain and operate the said railway or railways and such as may be necessary for stations, depots, engine houses, car-houses and machine shops, and in case any such corporation cannot agree with the owner or owners of any such real estate, or of any interest therein, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act.*"

"SECTION 19. * * * The Court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make

an order for the appointment of *five disinterested and competent persons,* who reside in the county where the premises to be appraised are situated, *commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken* in such county *for the purposes of the company,* and to fix the time and place for the first meeting of such commissioners."

"SECTION 20. * * * in determining the amount of such compensation, they *shall not make an allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad.* * * *"

"SECTION 22. * * * *the said land for the purpose of its incorporation* during the continuance of its corporate existence, by virtue of this or any other act; and all *persons* who have been made parties to the proceedings shall be *divested and barred of all right, estate and interest in such real estate, during the corporate existence of the company as aforesaid.* * * * *All real estate acquired by any company* under and pursuant to the provisions of this act, for *the purposes of its incorporation,* shall be deemed to be *acquired for public use.*"

"SECTION 25. In case any *title or interest in real estate required* by any company formed under this act, *for the purpose of its incorporation,* shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind the Supreme Court shall have power by a summary proceeding on petition, to authorize and empower such trustee, or the general guardian or committee of such infant, idiot or person of unsound mind, to *sell and convey* the same to such company, *for the purposes of its incorporation,* of such terms as may be just * * *."

"Section 26. Every corporation formed under this act shall have power:

1. To take and hold such *voluntary grants of real estate* and other property as shall be made to it, *to aid in the construction, maintenance and accommodation of its railroad;* but the real estate received by

voluntary grant shall be *held and used for the purposes of such grant only.*

2. To purchase, hold and use all such real estate and other property as may be *necessary for the construction and maintenance of its railroad,* and the stations and *other accommodations necessary to accomplish the object of its incorporation.* • • •

5. • • • and *in all cases the use of the streets, avenues, places and lands designated by the said commissioners and the right of way through the same for the purpose of a railway or railways* as herein authorized and provided, shall be considered, and is hereby *declared to be a public use* • • •."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 546

WILLIAM ROBERTS, as Receiver of the Manhattan Railway Company, *et al.*,

Petitioners,

—against—

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR RESPONDENTS, ROBERT WALTON GOELET, COOPER UNION FOR THE ADVANCEMENT OF SCIENCE AND ART, PERSHING SQUARE BUILDING CORPORATION, LINCOLN SAFE DEPOSIT COMPANY, OCEANIC INVESTMENT COMPANY, NATIONAL CITY REALTY CORPORATION, AND 145 EAST 41ST STREET CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 410) is reported in 265 N. Y. 170.

The opinion of Judge O'Malley (AX 1933) at the first trial in the Supreme Court, New York County, is reported in 126 Misc. Rep. 879.

The opinion of the Appellate Division (R. 283) on the first appeal is reported in 229 App. Div. 617.

The opinions of the Supreme Court on the second trial (R. 331-341) are reported in 141 Misc. Rep. 565, and 143 Misc. Rep. 129.

On the second appeal the Appellate Division affirmed without opinion (R. 407) 238 App. Div. 832.

JURISDICTION

The jurisdiction of this Court rests solely on that provision of Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936), which gives jurisdiction "where any * * * right * * * is specially set up or claimed * * * under the Constitution", and the federal claim is denied. The federal claim of petitioners is that due process of law guaranteed by the Fourteenth Amendment has been denied.

QUESTIONS PRESENTED

Broadly stated, the questions are whether the amount awarded to the Manhattan Railway Company by the New York courts as compensation for taking (for the purpose of demolition) the 42nd Street spur of the Third Avenue railway system in condemnation proceedings by the City, was so inadequate as to deprive it of property without due process of law, and whether the rules applied to measure value were so arbitrary as to amount to a denial of anything like just compensation.

The principal item in dispute is the value of the rights acquired by the Railway Company in years past to impair, by the maintenance and operation of the railway, the easements of the abutting property for light, air and access, the question being whether, on the findings and evidence, the amount awarded was

so arbitrary and inadequate as to amount to a denial of due process.

In respect of two other property items, the elevated structure and the general franchise to operate the railway, the question is whether on any acceptable theory of valuation consistent with the fact that the spur was worthless for railway purposes, they had anything more than scrap value.

It having been found by the Public Service Commission, after due hearing, that the spur was no longer a public convenience or necessity; and it having been found by the courts that the spur had permanently ceased to contribute to the Third Avenue elevated system enough traffic to pay for its operation, the question is whether the spur, without value as an operating property, had a nuisance value, that is, whether the Railway Company was in a position to bargain with the property owners for a demolition of its structure; and whether on the evidence adduced (all proffered evidence on the point having been received) this Court can say that the value of these easements to the Railway Company, for purposes of extracting from the property owners a price for abating the nuisance, largely exceeded the value awarded by the New York courts.

The position of the petitioners

(aside from their claim for a reproduction cost basis on the theory that the spur had value for operation) amounts to a claim that although the spur may have had no value in operation, nevertheless the Company had a right to continue operating at a loss to coerce the abutting owners into paying for its demolition, and that the value to the Railway Company of these easements, that is, the price for which it could sell

out to the abutters, is to be measured by the amount the abutting property would presently increase in value by demolition of the road, and they assert the courts below adopted an arbitrary rule of valuation which excluded this element of value.

These respondents contend that

(1) The spur had no value in operation, and was a permanent drain on the earnings of the system, and the reproduction cost basis must be discarded.

(2) The value to the Railway Company, and not the gain to the abutters, measures just compensation, and this so-called nuisance value of a railway which is no longer a public convenience and operates at a loss, has so far no judicial support.

(3) If the possibility of sale to abutting property owners is to be considered in fixing value, it appearing that all the evidence on this theory proffered by the petitioners was received, then on the facts disclosed by the record there is only a speculative basis for the claim that the property owners at the date of taking, considered as a group (as they must be), would have paid more than was awarded.

(4) No arbitrary rule to the injury of the petitioners was applied by the New York courts. They received, and both the Appellate Division and the Court of Appeals considered, all the proffered evidence on nuisance value or other theories. They did not hold as a matter of law that the adjudicated value of the easements at acquisition was the measure of their value.

If an erroneous rule was applied below, then, on the whole record, if this Court cannot say that the amount awarded is substantially less than the correct theory required, there has been no denial of due process.

(5) On either theory of valuation permissible to a railway without value as an operating property, one theory excluding nuisance value and the other including it, the franchise and structures had only scrap value.

STATEMENT

The facts are so fully stated in other briefs that we need only summarize those specially pertinent to our argument.

This was a proceeding by the City of New York to condemn and take the 42nd Street spur of the Third Avenue elevated railway system. Under New York law proceedings to assess the cost on benefited property were conducted as a part of the condemnation proceeding, bringing abutting and adjacent property owners into the case.

The property was taken as of date December 7, 1923.

The spur was finished in 1878. It extended from the main line at Third Avenue and 42nd Street, west on 42nd Street, across Lexington Avenue to the Grand Central Station at Park Avenue, a total distance of about 900 feet (Map, AX 122).* It operated a shuttle service, passengers traveling to or coming from

*On the second trial the entire record of the first trial, including the evidence, was received in evidence as Exhibit AX. This is contained in four volumes of the present record referred to as "AX". The remaining volume, herein referred to as "R", contains the proceedings at the second trial and thereafter. References are to pages.

the Grand Central Station having to change cars at Third Avenue and 42nd Street, on a free transfer basis. Its purpose was to accommodate passengers traveling on the main line who desired to board or leave trains at the Grand Central.

The three items of property in the spur were:

(1) The franchise from the public to operate the spur, for which nothing was awarded;

(2) The elevated structure in the street, for which scrap value of $235 was awarded; and

(3) Rights or easements of the Railway Company to interfere by maintenance and operation of the road, with the easements of light, air and access appurtenant to the abutting realty, for which the award was $539,117.41.

These rights or easements as against abutting property owners were acquired by the Railway Company after its construction.

The total frontage of property on both sides of 42nd Street along the line of the spur was 1698 feet 6 inches (R. 319). Of this frontage, rights or easements against the abutting property were obtained (1) on 711 feet 3 inches by judicial determination either in condemnation cases or in injunction suits, the aggregate amount awarded at date of acquisition being $175,199.99 (R. 236); (2) 583 feet 10 inches by voluntary settlement, for which the Railway Company paid $91,295 (R. 319); and (3) 403 feet 5 inches acquired by prescription, including Depew Place, an intersecting street, for which the Railway Company paid nothing.

The claimants introduced evidence that the cost of reproduction new of the elevated structure ($207,349, AX 410), less depreciation, as of December,

1923, was $185,513 (R. 409). The City's witnesses placed the cost of reproduction, less depreciation, at $120,438 (AX 467).

The claimants' expert (AX 1026) valued the easements as of December 7, 1923, by taking the difference between the value at that date of the abutting property with the elevated structure present, and the value with the structure removed, which difference, in his opinion was $3,600,000. Adding, for good measure, $100,000 as the value of the franchise, and $300,000 for the value of the space in the street occupied by the structure, they reached a total value of $4,185,000, for a property which had ceased to have any value for the purpose for which it was built, and could not have cost more than one-eighth of that sum. The original outlay for easements was $266,494.99. Price levels in 1878 for labor and steel were well below those for 1923. The structure could not have cost as much as the 1923 cost new. Accepting 1923 cost new of the structure, with the addition of the most extravagant allowance for organization, legal and overhead expense, would still leave the original cost of the spur, including easements, well below the award of $539,117.41.

Nature of the Easements

Where private settlements were made with the property owners when the easements were acquired, and where the value was adjudicated in judicial proceedings, conveyances from the abutters to the Railway Company were taken. These grants by the abutting property owners by their terms were grants of easements to construct, maintain and operate the railway structure (AX 1649).

Where the rights or easements were obtained by prescription they were limited by the user. *American Bank Note Co.* v. *N. Y. Elevated R. R. Co.*, 129 N. Y. 252; *Simons* v. *Munch*, 115 Minn. 360.

Whatever may be the nature of the Railway's rights in the streets as against the abutting property owners, those rights were not like easements in gross, which could be sold separate and apart from the railway, or which remained an asset after demolition. They were limited to the operation and maintenance of the railway, and by their nature expired *ipso facto* when the railway ceased to maintain and operate the spur.

The Spur Had No Value for Railway Purposes

The most important fact in the case is that the spur had no value as an operating property, either alone or as part of the Third Avenue elevated system.

The Laws of New York, 1917, chapter 788, authorized the Railway Company to abandon the spur upon obtaining a certificate from the Public Service Commission that the road was no longer a public convenience and necessity, or that it was an obstruction to the street. The company declined to avail itself of that permission, obviously because it hoped to extract something from the abutting property as a price for removing the spur. Thereupon, by chapter 611 of the Laws of 1919, it was provided that if the Commission should make such a certificate, the City could condemn.

After a full hearing before the Public Service Commission concerning the amount of traffic produced by the spur and its value as part of the system, the Public Service Commission found and certified both that the spur was no longer a public convenience and

necessity, and that it was an obstruction (AX 1096-1108).

The company acquiesced in this finding and took no appeal to the courts.

In the condemnation suit this question was again thoroughly litigated (AX 320-325; 387; 514-616; 626-628; 703-764; 785-813; 1042-1049; 1055-1065; 1126-1138). This evidence covered fully *the value of the spur as a part of the entire system and the amount of traffic produced for the system* through the operation of the spur; evidence as to the number of passengers on the system before and after the removal of the spur was presented. The City offered persuasive evidence that after August 1, 1918, when the Lexington Avenue subway was completed and placed in operation with its Grand Central Station, the revenue produced by the spur for the elevated system was less than the cost of the spur operation. A temporary reduction in traffic at the station at 42nd Street and Third Avenue, following the end of service on the spur, disappeared as soon as the station at Third Avenue and 42nd Street was rebuilt (AX 1046).

Each of the New York courts which has considered this question has made findings on this question. In the first trial in the Supreme Court, Judge O'Malley considered the evidence, and said:

> "Suffice it to say that after a full consideration of the evidence thus referred to, and of all of the evidence in the case, and after viewing the structure in the course of its operation, I am of the opinion that the claimants have failed to sustain the burden of establishing that the spur, at the time title vested, when considered by itself, was profitably operated" (AX 1955).

By the phrase "when considered by itself" he did not exclude the revenue produced by the spur for the system as a whole. The evidence covered the amount of traffic contributed by the spur to the whole system.

The Appellate Division, on the first appeal, said:

> "Upon this record it is fair to say that the cost of the operation of the spur exceeded by many thousands of dollars yearly the revenue therefrom, and that the taking by the city of the spur was a benefit to the claimants" (R. 288).

And again:

> "Since the record shows that this spur could not longer be operated except at a larger annual loss and that the taking by the city was a distinct benefit to the claimants, and the Public Service Commission, after proceedings and hearings, having determined and ordered that the spur was no longer necessary and convenient for the public service, it, therefore, follows that the right to run an elevated railroad in this street under these conditions was of no value" (R. 290).

The Court of Appeals, after referring to the findings of the Appellate Division, said:

> "The whole system was operated at a profit but the finding that the Forty-second street franchise had no value should not be disturbed. While potentially traffic might be driven to the elevated by the congestion of the subways and the spur might have value as a traffic originating line such value is too speculative to be considered" (R. 414).

The New York courts have definitely found that, treated as a part of the system, the spur at the time of taking and prior thereto did not originate or produce enough traffic for the system to pay for its operation. They have also found in substance that there was no prospect of any change in this situation. These findings are supported by abundant evidence.

What the New York Courts Did

At the first trial Judge O'Malley received all evidence proffered by the petitioners on their own theories of the law. He expressly stated that he would receive evidence on any theory, so that when the case finally reached the Court of Appeals the evidence on the legal theory adopted by it would be available (AX 820, 1935). At that trial the petitioners had in mind the so-called nuisance value theory and claimed, among other things, a value for the easements based on the possibility of obtaining a price from the property owners for abandonment of the spur (AX 859).

After the case had gone to the Appellate Division and was reversed and remanded, at the second trial in the Supreme Court, the entire record, including all of the evidence offered at the first trial, was introduced by stipulation (R. 200) and constitutes the first four volumes in this record, described as "Claimant's Exhibit AX". At the second trial it was still open to the claimants to offer further evidence on any theory of the law, with a view to ultimate review by the Court of Appeals (R. 189). No evidence offered by petitioners at the second trial was excluded.

When the case reached the Court of Appeals, that court had before it all of the evidence proffered by the Railway Company on every theory which the company

relied on, including such evidence as bore on the possibility of sale to abutting property owners, and this Court now has all that evidence before it.

On the first appeal the Appellate Division did not at the outset hold as a matter of law that the adjudicated value of the easements at the date of acquisition constituted the measure of their present value to the Railway Company. Approaching this question, the Appellate Division first concluded as follows:

> "We find, therefore, that these rights should be valued at the time of taking *at not less* than upon the basis judicially determined as their value at the time of their acquisition" (R. 301). (Italics ours.)

This was a finding advantageous to the Railway Company. The substance of the court's reasoning was that, to allow the abutting property owners to gain by abandonment of the road without awarding anything to the company for the easements, would amount to an "unjust enrichment" of the property owners (R. 295). Having concluded that the adjudicated value at the date of acquisition was the *minimum* to be awarded, the Appellate Division said:

> "The question then arises, should they be valued at a greater sum?" (R. 301).

In considering whether a greater value should be awarded, the Appellate Division considered all of the evidence, including specifically the so-called nuisance value or theory of possible sale to the abutters for demolition. As to that, it said:

> "But such a proposition is based upon fanciful assumptions, to sustain which there is no evi-

dence in this record. Testimony is lacking to show that any or a sufficient number of property owners would or could purchase said rights" (R. 302).

It characterized this theory as a mere "hypothetical possibility" (R. 303).

Having determined that the *minimum* was the adjudicated value at the date of acquisition, and that on any theory, the evidence did not justify the award of a larger sum, it reached the conclusion that the award for easements should be "the value judicially determined at the time of the original acquisition of these rights" (R. 305), and remanded the case for proceedings in accordance with that view. It held, logically enough, that on the record the franchise had no value, and the structure only a scrap value, calling attention to the fact that the award of compensation for the easements presupposes a demolition of the structure.

On the second trial, following these instructions, the trial court found the franchise value to be nothing; that the structure value had only a scrap value of $235 (the City bearing the cost of demolition); and it awarded $539,117.41 as the value of the easements. As only a part of the easements had ever been judicially valued, the court applied the judicially ascertained value of part of the frontage as closely as practicable to those parts of the frontage where the easements had been acquired by purchase or prescription. The total award was $619,352.41 (R. 340), which included $80,000 for cost of reconstruction of the station at Third Avenue and 42nd Street, which is not in dispute, and $235 for scrap value of the structure, leaving the net amount awarded for easements $539,117.41. Interest on this amount from the

date of taking to the date of judgment was provided for.

The Court of Appeals had before it the entire record, including all of the evidence on the nuisance value theory, and all other theories which were presented by these petitioners. It held that the original judgment of Judge O'Malley at the first trial was not before it for review (R. 413). With regard to the contention of the property owners and the City that the award for the value of easements was too large, it said:

> "The contention of the city, that the railroads are entitled to no compensation, is based on the argument that these rights were of no use to the railroads except as they were compelled to acquire them to operate and of no value except to a going concern, *has some logical force,* but such rights were obtained in order to permit the roads to exercise their franchise in the street in perpetuity, and when the city terminated such rights it should fairly compensate the roads for the loss of such rights" (R. 413). (Italics ours.)

It said further:

> "The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street. It, therefore, acquired no real title to these easements apart from the operation of its road" (R. 414).

As to whether the Railway Company was entitled to more than had been awarded below, the Court of Appeals said, after considering the whole record:

> "On the whole, a fair valuation of the property taken is the amount awarded by the Appellate Division" (R. 415).

The opinion must be accepted as an approval, based on the whole record, of the conclusion of the Appellate Division that on no theory did the evidence show the value of the easements to the Railway Company, to be larger than the amount awarded.

Judge Lehman filed a dissenting opinion, emphasizing the so-called nuisance value, pointing out the possibility of the Railway Company's obtaining a price from the property owners for abandonment of the spur, saying:

> "It is clear, I think, that if the railway company were not compelled to abandon the structure, the abutting owners would be willing to pay the railway company a very substantial amount for its abandonment with its consequent accretion of great additional value to their land and buildings. That amount would constitute the realizable value of the railroad property to its owner, even if its user for railroad purposes were unprofitable and a burden upon the owner.
>
> It is suggested that what I have called 'realizable value' is, in fact, only 'nuisance value'; that is, the amount which an owner can exact as the price for refraining from injury, rather than the price of a right of property which the owner can exercise for a legitimate purpose. The suggestion may not be lightly cast aside. One of the objects of the exercise of the power of condemnation of private property for a public use is to prevent an owner of property from exacting more than the value which a ready seller could obtain from a willing buyer. The power to injure the value of neighboring property may come through ownership of property, but is not itself a property right nor an element in the

value of property which the courts must recognize when they fix the compensation to be paid when the property is taken under the command of the sovereign" (R. 418).

Nevertheless, he said that the possibility of obtaining a nuisance price from the abutters was a factor to be considered. He said:

> "To fix the value which might be derived from a sale of these rights would doubtless present a difficult problem" (R. 421).

Speaking of the increment in value of their property accruing to the property owners on abandonment of the spur, he said:

> "It does not follow that the owner of the abutting property would be willing or compelled to pay that price to secure the increment in value" (R. 421).

And again:

> "* * * we may say that the railway company would accept a much smaller price for the retransfer or abandonment of its rights to maintain the railroad structure if the operation were a burden" (R. 421).

He concluded:

> "The court must determine, as a question of fact, in fixing values which depend upon business judgment, the price which would be fixed by negotiation between reasonable business men seeking profit" (R. 421).

The majority opinion does not say that the court declined to consider this element of value, and the dissenting opinion does not assert that the court had

overlooked it. After announcing his theory, the learned dissenting judge fails to point out any method of computing in dollars the value of the easements to the Railway Company on the nuisance theory, notwithstanding the company had been permitted to give evidence on that theory, and all of the available evidence on the point was before the Court of Appeals.

The Prospect of a Purchase by the Abutting Owners

The property owners had been agitating removal of the spur since 1912, but there was no evidence that from that date to the date of condemnation, December 7, 1923, there was any progress made in getting the property owners together on a bargain, either as to the gross amount to be paid or the apportionment of the cost among them. The Forty-Second Street Association, which included in its membership most of the abutting owners, believed after the Lexington Avenue subway was completed that the Railway Company would voluntarily abandon the spur (AX 830). In 1917 the legislature had passed an act giving the company permission to abandon it on certificate of the Public Service Commission. Prior to the condemnation proceeding, the Board of Estimate and Apportionment had determined that the property to be benefited included the district from 34th Street to 50th Street, and from 2nd Avenue on the east to 5th Avenue (R. 89), and that only 65% of the award would have to be borne by the abutting property owners. Thus, previous to the condemnation, the group to be united on any bargain was shown to be 2,000 or more (R. 80).

The record shows that the property owners have consistently believed that the railway could be forced to abandon the spur without any payment for value

of easements. It definitely appears that during the entire course of this litigation the property owners have been in dispute among themselves as to the apportionment of the burden (AX 1073; 1079-80).

SUMMARY OF ARGUMENT

I. In a condemnation case from a state court reaching this Court on the claim of denial of due process, the function of this Court is not to act as a court of appeal and error. It will not substitute its judgment for that of the state courts on disputed questions of fact or debatable questions of law. Notwithstanding the state courts may have committed errors of law or fact, or applied erroneous principles of valuation, if the record, as in this case, contains all the evidence proffered by the claimants, this Court should not hold that due process has been denied, unless on the whole record it concludes the award does not approximate fair compensation computed on correct principles.

II. As the spur was found by the state tribunals, on abundant evidence, to be no longer a public convenience, and to have permanently ceased to produce enough revenue for the system of which it was a part to pay the cost of operation, and had ceased to have any value for railway purposes, the reproduction cost basis of valuation must be discarded. This leaves two possible theories of value.

One eliminates the so-called nuisance value, or "market value" arising from the possibility of exacting a price from the owners of abutting property for demolition. On this basis the value of the spur is limited to the scrap value of the structure, as the

franchise, and so-called easements acquired from the abutting owners, expire with the abandonment of the spur.

The other theory includes such value as can be ascribed to the easements in the hands of the company, through possibility of sale to the abutting owners. This nuisance theory has not been sanctioned by any court. In this case it leads to the conclusion that the spur increased in value to a fantastic sum by virtue of the fact that its obsolescence for railway purposes, placed the owners in a position to sell out to the abutting owners.

Assuming that possibility of sale to abutters must be considered, this record, containing all the proffered evidence on the point, does not warrant a finding that the true value of the easements exceeded the award.

III. The facts are such that a possibility of sale to abutting owners was wholly fanciful. The "market" was limited to a group whose agreement on price and apportionment among themselves was required and is shown to have been impracticable. The property owners believed and insisted that the company was not entitled to pay for the easements. Forcing unification of the property owners as buyers, through the City's power to levy assessments, may not be considered in ascertaining market value.

In a contest of endurance between the company, losing money in operation of the spur, and property owners suffering from it, the latter were in a better strategical position. At least one may only speculate as to which would first succumb. Only a speculative basis exists for a guess as to what, if anything, the property owners would have paid. On the whole

record no one can say that it would have been more than the award.

IV. No arbitrary rule was applied to the prejudice of the company. The New York courts did not hold as a matter of law that adjudicated value of the easements at the time of acquisition was the sole measure. The Appellate Division concluded first that this adjudicated value was *the least* which could be accepted. This was to the advantage of the company. It then examined the whole record to ascertain if a larger value should be awarded, and held that only a speculative basis for a larger value was shown. The Court of Appeals merely held on the whole record that the amount awarded was fair. The New York courts received and considered all evidence proffered by the petitioners on every theory they saw fit to urge.

V. On any theory of valuation open on this record the franchise had no value and the structure only a scrap value. If the nuisance theory of possible sale to abutting owners be accepted, the award of that value presupposes a demolition of the structure. Rejecting the nuisance value, and considering the spur as valueless for operation, the result is the same.

CONCLUSION. The New York courts gave painstaking consideration to all the petitioners' claims. The case presented novel and difficult questions of law and fact. No conclusion reached was unfair or without support in reason and on the evidence.

On any view this Court may take of the law, it cannot say that the value to the company was clearly more than the award.

There was no denial of due process.

ARGUMENT

I.

In a condemnation case reaching this Court from a State Court under the due process clause of the Fourteenth Amendment, the function of this Court is not that of a Court of Appeal and Error; it is limited to determining on the whole record whether there has been an obvious or arbitrary denial of just compensation.

In *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, this Court held that a denial by state courts of just compensation for property taken for public use under the power of eminent domain, is a deprivation of property without due process of law under the Fourteenth Amendment. In that case the city condemned part of the railway's right of way for street uses, and an award of One Dollar was sustained as not a denial of due process. It said (p. 246):

> "Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company, by reason of the opening of a street across its right of way, we cannot, on that ground, reexamine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation.
>
> We say, 'in absolute disregard of the company's right to just compensation', because we do not wish to be understood as holding that every order or ruling of the state court in a case

like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted."

And again (p. 247):

"In harmony with those views, we may say in the present case that the state court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation."

In *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, where a railroad company was constructing its tracks on a street and the question was the amount of compensation to be paid an abutting owner, the Court said (p. 565):

"It is also not open to further debate, since the decision in *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just

compensation. But in this respect we quote the restriction placed in the opinion then filed (p. 246):

> 'We say, "'in absolute disregard of the company's right to just compensation", because we do not wish to be understood as holding that every order or ruling of the state court in a case like this may be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the Federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted.'

While in cases of this kind coming from the Supreme Court of a State, questions of fact passed upon in the state courts are not here open to review, *Egan* v. *Hart*, 165 U. S. 188, and cases cited in the opinion, it may not be inappropriate to notice that the award of compensation as finally sustained gave to the respondent the sum of $63,000. As the valuation they placed upon the plant, outside of the realty, was only $150,000, and of the realty the like sum of $150,000, though the realty cost in 1871 less than $30,000, and as none of the ground, upon which the plant stood and the business was carried on, was taken by the Depot Company, but only the use of the street in front thereof, and that not so as to exclude them from its use, it is obvious that the award, whether adequate or not, was not one in reckless disregard of their rights."

And again on page 578:

> "We find nothing in them which justifies an interference by this court with the proceedings of the state courts; nothing in which it can be said that any ruling of those courts was in absolute disregard of the respondents' right to compensation."

In *Appleby* v. *Buffalo*, 221 U. S. 524, which reached this Court on error to the Supreme Court of New York, the city of Buffalo was condemning some submerged lands. The Court said (p. 529):

> "Indeed, the case has been argued, apparently, upon the theory that this court has the power, embraced in a general right to review, to correct errors in trials and procedure in the state courts. This court has had frequent occasion to say that its right to review the judgment of the highest court of a State is specifically limited by the provisions of §709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the state court."

The Court further quoted with approval, at page 531, its statement in *C. B. & Q. R. R.* v. *Chicago, supra,* which we have quoted above. With reference to *Backus* v. *Fort Street Union Depot Co., supra,* the Court said (p. 532):

> "The question of what amounts to due process of law in cases of this character came again before this court in the case of *Backus* v. *Fourth*

Street Union Depot Co., 169 U. S. 557. In summing up the essentials of due process of law in condemnation cases this court said: 'All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution.'"

An examination of the record in the *Appleby* case shows that the owners of the submerged lands had parted with title to the adjacent riparian lands; that to make the submerged lands of any value the ownership had to be united with that of the riparian lands; that the riparian lands with the ownership of submerged lands attached were worth from $1,000 to $4,000 per acre for wharfage purposes; notwithstanding the possible market for the submerged lands among the riparian owners, this Court sustained an award of six cents for the submerged lands as not a denial of due process.

In *McGovern* v. *City of New York*, 229 U. S. 363, also coming from the Supreme Court of New York involving the acquisition under the power of eminent domain of land for use as a reservoir site, the Court said (p. 370):

"If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought and in that sense is deprived of his property can come to this court. The result of a judgment in trover, at least if satisfied (*Lovejoy* v. *Murray*,

3 Wall. 1; *Miller* v. *Hyde,* 161 Massachusetts, 472), is to pass property as effectually as condemnation proceedings—yet no one would contend that a plaintiff could come here under the Constitution simply because of an honest mistake to his disadvantage in laying down the rule of damages for conversion. If the plaintiff could bring such a case to this court, one might ask why not the defendant for a mistake in the opposite direction that will deprive him of money that he is entitled to keep.

When property is taken by eminent domain it equally is recognized that there must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally. *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 575, 576. As it is put in the case most frequently cited in favor of the right to a writ of error, 'we are permitted only to inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the company's right to just compensation.' And again the final judgment of a state court 'ought not to be held in violation of the due process of law enjoined by the Fourteenth Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation.' *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226, 246, 247; *Appleby* v. *Buffalo,* 221 U. S. 524, 531, 532.

The present case of course does not show disregard of McGovern's rights or that he was prevented from obtaining substantially any compensation. Even if the plaintiff in error is right, it shows only that the Commissioners and courts of

New York adopted too narrow a view upon a doubtful point in the measure of damages."

The Court also considered the question of the availability of the tract for reservoir purposes arising out of the fact that hundreds of separate tracts were to be acquired. It said (p. 372):

"If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation. See *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226, 249. The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195. In estimating that probability the power of effecting the change by eminent domain must be left out. The principle is illustrated in an extreme form by the disallowance of the strategic value for improvements of the island in St. Mary's River in *United States* v. *Chandler-Dunbar Water Power Co., ante,* p. 53."

The Court said again (p. 373):

"We are satisfied on all the authorities that whether we should have agreed or disagreed with the Commissioners, if we had been valuing the land, there was no such disregard of plain rights by the courts of New York as to warrant our treating their decision, made without prejudice,

in due form and after full hearing, as a denial by the State of due process of law."

This case has been cited with approval in *Seattle, etc. Ry. Co.* v. *State of Washington, ex rel. Linhoff*, 231 U. S. 568, where the Court said that "it takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment"; and in *O'Neill* v. *Leamer*, 239 U. S. 244, 249. See, *Olson* v. *United States*, 292 U. S. 246, 259, note 3.

In rate cases coming from state courts which also involve the due process clause of the Fourteenth Amendment, the situation is similar.

In *Los Angeles Gas & Electric Co.* v. *Railroad Commission*, 289 U. S. 287, the Court said (p. 304):

> "We do not sit as a board of revision, but to enforce constitutional rights. *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 446. The legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself. We are not concerned with either, so long as constitutional limitations are not transgressed. When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached, but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established."

In *West Ohio Gas Co.* v. *Public Utilities Commission*, decided January 7, 1935 (55 Sup. Ct. Rep. 316),

the Court, after citing with approval *Los Angeles Gas & Electric Corp.* v. *Railroad Commission, supra,* said (p. 320):

> "Our inquiry in rate cases coming here from the state courts is whether the action of the state officials in the totality of its consequences is consistent with the enjoyment by the regulated utility of a revenue something higher than the line of confiscation. If this level is attained, and attained with suitable opportunity through evidence and argument (*Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 54 S. Ct. 148, 78 L. Ed. 260) to challenge the result, there is no denial of due process, though the proceeding is shot through with irregularity or error."

The functions of this Court in condemnation or rate cases reaching it from the lower federal courts are different than in cases from the state courts. It may be that in eminent domain cases from the state courts, this Court has made broader statements as to the limits of its jurisdiction than it has in rate cases, and that it has been less inquisitive about the factual basis for state court findings in eminent domain cases than in the other type of case.

We do not find it necessary in this case to claim too much for the expressions of the Court in eminent domain cases above quoted. It is enough to say that the decisions clearly support the view that this Court will not substitute its judgment for that of state courts in eminent domain cases on disputed questions of fact or debatable questions of law, nor will it act as a court of error and appeal to correct errors of law or fact. We think it is also settled that even if the New York courts applied erroneous rules of law in measuring the compensation, this Court will

not say there was a denial of the process, unless on examination of the whole record it concludes that the amount of the award was clearly inadequate as compared with the lowest amount which could reasonably have been justified on the right theory of the law. This is as far as the necessities of this case require us to go.

II.

Only two possible theories as to value are open on the record in this case; one, that the spur had no value except its scrap value, and the other involving the acceptance of the nuisance theory calling for consideration in valuing the easements of the amount which the property owners might have paid for demolition of the spur.

The outstanding fact in this case found by the New York courts and supported by abundant evidence is that the spur, through the development of new means of transportation and the construction of the Lexington Avenue subway, had *permanently* ceased to have any value as an operating property, and that it no longer was contributing or could contribute to the system, of which it was a part, traffic, the revenue from which would pay the cost of the spur's operation. What the rule for ascertaining value would have been if this property continued to be convenient and necessary for the accommodation of the public with capacity to earn its operating expenses or more, we need not consider.

With this fact as a starting point, the claim of the petitioners that cost of reproduction of the structure, less depreciation, and the probable cost of acquiring the easements in 1923, constitute the meas-

ure of compensation, must be discarded. Their claim on the reproduction cost basis totals $4,100,000.00. These figures would be impossible, if the spur were a profitable operating facility. On no conceivable basis could the company ever have earned a return on this sum or justified it as a prudent investment. The reproduction cost theory, however its use may be proper in case of a going concern with net revenues serving a public need, has no application to this case.

There remain only two possible theories as to value. The first is that consistently contended for by the property owners and the City that the spur had only a scrap value, that is, the value left after demolition. On this theory, as the franchise would be abandoned and the rights as against the abutting property owners would vanish *ipso facto* by the abandonment of the spur, no value could be assigned to the spur beyond the scrap value of its physical structures.

The second possible theory requires giving to the easements of the Railway Company what Judge Lehman described as a nuisance value. This theory assumes that the company had a right to continue operation at a loss, of a property no longer necessary to the public, with a view to coercing the abutters to buy their peace from a continuation of the nuisance, and that the easements, therefore, had a market value through a possible sale to the abutting owners. Confronted with the rule that it is the value to the owner, not what the taker gains, which measures compensation (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53); the petitioners are forced to give this "nuisance" value the appearance of a market value in the hands of the Railway

Company, for sale in a limited market, to "willing" purchasers, viz.: the abutting owners. This claim is unique. The franchise was to operate the railway as a means of transportation, not to exact a nuisance value from its neighbors. Carried to its logical conclusion, it would mean that if a railway company is ordered by the public authorities to discontinue a branch or spur on which traffic has reached the vanishing point and which is no longer necessary or convenient to the public, and which is operated at a constant loss, burdening the revenues of the entire system, and which has no prospects for the future, the company may decline to obey the order on the ground that it has a right to continue with the hope of inducing property owners suffering damage from its continued operation to pay for its abandonment.

The result of the nuisance theory in this case is that the spur increased enormously in value to its owners because it was no longer a public convenience and necessity and could not earn its operating expenses. So long as the spur was required for accommodation of the public and produced some return on the investment, the Railway Company was obliged to operate it and be satisfied with moderate returns, and was in no position to bargain with the abutting owners; but the moment the spur became moribund and permission of the Public Service Commission was given to abandon it, the Company was at once in a position to bargain with the abutters, and, therefore, its easements should be valued at what the abutters might pay, an amount which the Company insists is to be measured by the gain to the abutters determined by the difference between the values of the abutting property before and after the removal

of the spur. If this theory is correct the owners of the elevated systems will yearn for the day when their property becomes obsolete for railway uses.

These claims are fantastic. There is somewhere a flaw in the nuisance theory. See *Consolidated Gas Co.* v. *New York*, 157 Fed. 849. Nevertheless the state of this record is such that the Court need not wholly accept or discard it as an element of valuation. Assuming that the possibility of sale to abutters may be considered in determining value, we are content to rest on the position that the company was given a full opportunity to present all its evidence on this point, and the record does not require a finding that more than the award could have been obtained from the abutting owners.

III.

On the facts disclosed there is no basis for a finding that there was a market among the abutters which would support a market value of the easements in excess of the award.

The Appellate Division so held (R. 302) on ample evidence.

We emphasize here the fact that all evidence proffered by the Railway Company on the possibility of a sale to the abutters was received. It was all before the Court of Appeals, and is all in the present record. For this Court to review the findings and evidence on this point to determine whether due process has been denied is no more than it has repeatedly done in eminent domain and rate cases.

We here enumerate some of the facts bearing

upon market value of the Railway's easements on the nuisance theory of sale to the owners of abutting property.

1. There was no room for competition among purchasers. The market, if any, was limited to a group of property owners who were not urged to buy by the pressure of competition. The Railway Company was losing money constantly through the operation of the spur. The property owners on the other hand were continuing to suffer the nuisance. Thus would arise a contest of endurance in which the property owners were in a strong strategical position. We may only speculate as to which would first succumb. Much of the property was leased. No gain in rentals would accrue before the expiration of the leases as the result of a present further investment by the property owners to procure abandonment of the spur.

2. The supposed purchasers among whom the market was to be found were numerous. A purchase required them all to unite. A part would not pay for abolishing a nuisance for the benefit of those who did not contribute. The only hope of sale was through complete union of the property owners on a proposition. This numerous group had to agree not only as to the gross price to be paid, but as to the apportionment of the burden among themselves. The record shows that they have consistently disagreed as to the apportionment among the various tracts and have litigated that question almost to the end.

3. The attitude of the property owners at and prior to the date of taking, shows affirmatively that no purchase by them was a reasonable possibility.

Prior to the taking, the Forty-Second Street Association thought that the Railway Company would be forced to abandon the spur without any payment for its easements. The property owners have contended on the advice of able counsel that nuisance value was not a basis for fixing compensation for the property. There is no evidence to justify the suggestion that they thought at the time of the taking, or prior thereto or for a long time thereafter, that they ever would be required to pay anything for the easements, for the spur had been declared to be no longer a public convenience, and a drain on the revenues of the system.

4. It is obvious that the abutting owners in no case would have paid anything like $3,600,000, the amount in which petitioners say the abutting property was enhanced in value by removal of the spur. Before the condemnation the Board of Estimate and Apportionment had determined that only 65% of the cost of condemnation would be borne by the abutting property, the balance being spread over a zone between 34th Street and 50th Street, 2nd Avenue and 5th Avenue. That zone contained some 2,100 parcels. Logically, if the nuisance theory is to be applied, the owners of all property in the zone being benefited, constitute the group of prospective purchasers who must have been united in agreement to make a bargain with the Railway Company. To be consistent, the petitioners should have proved the increment in value to all the property in the zone as the measure of the value of their easements. They shrank from the implications of carrying their theory to this logical conclusion.

5. If it be suggested that a union of the property owners constituting the market for the easements could have been forced by an assessment proceeding under the power of the City to levy for local improvements, it may be said that in condemnation cases where the value of the tract to be taken has depended on its union with others, it has been held that the possibility of union by condemnation proceedings should not be taken into account. *McGovern* v. *New York*, 229 U. S. 363, 372; *New York* v. *Sage*, 239 U. S. 57. By the same reasoning the possibility of forcing a unification of property owners as purchasers by the power of assessment, is not to be taken into account in the application of this nuisance theory, which proceeds on the assumption that there was a market value for sale by a ready seller to a willing buyer.

6. The City could not be considered as a possible purchaser on the nuisance value theory. It could not take the hazard of voluntarily paying for the company's easements with the knowledge that the amount paid would be resisted as unwarranted and no basis for an assessment.

In *Appleby* v. *City of Buffalo, supra,* where the possibility that the submerged lands being condemned, could be sold to the adjacent riparian owners for wharfage purposes was plain from the record, an award of six cents for the submerged lands was sustained.

In *Olson* v. *United States,* 292 U. S. 246, involving just compensation to be paid for lands for reservoir purposes bordering upon the Lake of the Woods, the Court took into account the possibility of unification by purchase of the ownership of numerous tracts as

an element of value, and on the whole case concluded that it was speculative. It said:

> "The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value."

Here we have the converse of that proposition. The property to be taken was unified in ownership, but the supposed market for it was among a group which had to be united in agreement on price and apportionment among themselves. We think that by reasoning analogous to that in the *Olson* case and on the record here, the possibility of combining the property owners on this basis was not substantial enough to justify a finding of market value in excess of the award.

We may speculate on the possibility that if the Railway's price had been low enough, that is, so small as to instantly attract the property owners, some of them might have hurried to close the bargain, but there is no basis for any inference that any price as high as $519,000 would under all the circumstances of this case ever had been reached by negotiation. Assuming that nuisance value was a factor, and that the prospect of property owners paying something for demolition of the property is to be considered, how can this Court say on this record that the value on any such theory was substantially larger than the award? By what method of computation can any sale value on this theory be satisfactorily computed? The Petitioners say (their Brief, p. 34) that these easements had a "clearly and readily ascertainable

market value" through sale to the abutting owners. They make no guess of their own as to the amount, except to insist on $3,600,000.00, the amount of the alleged benefits to abutting owners. They do not point out how this Court may fix a figure between zero and $3,600,000.00. No expert witness attempted it. The learned dissenting judge in the Court of Appeals made a plausible argument for the theory, but utterly failed to point out, with the whole record and all the evidence on this theory before him, how he would compute sale value on the nuisance theory, or do more than speculate as to what, if anything, could have been obtained by the Railway Company in that way. The majority opinion evidently had this in mind when it said:

> "On the whole, a fair valuation of the property taken is the amount awarded by the Appellate Division."

IV.

No arbitrary rule to the injury of the petitioners was applied by the New York courts.

The refusal of the New York courts to accept the reproduction cost basis of valuation with its cost of reproduction, less depreciation, of the structure, and the present cost of acquisition of the easements from abutting property with its resulting valuation of $4,000,000 for railroad property which cost only a fraction of that amount, never could have earned a return on a substantial part of it and had reached the stage of obsolescence where it was no longer a public convenience and produced an operating loss, was not arbitrary.

The petitioners' claim that the New York courts adopted an arbitrary rule, is based on the assertion that they held as a matter of law that the adjudicated value of the easements at the date of acquisition was the measure of their value at the date of the taking. The New York courts did not proceed in quite that way. At the first trial, the court said:

> "As I indicated at the outset of this proceeding, I think the proper way to do is to take the testimony offered on the theory presented by the City, and that presented by the other side. This is the first of these cases that has ever been tried and it is a novel question. We do not know how the Court of Appeals will finally look at it. * * * I do not think it would be a wise thing at this stage of the proceedings to shut out this evidence, even though I may be at the present time convinced that it is not the proper measure of damages that I shall adopt. I believe in taking it and having you protected in every way. * * * It would be very unfortunate not to have this testimony spread upon the record, and then have the higher court rule that it ought to have been admitted for some purpose and that the court ought to be apprised as to the value of the abutting property with and without these easements. I do not know what view the Appellate Courts will take, and in order to be absolutely safe I shall take this proof" (AX-820-21).

All of the evidence proffered by the claimants on the nuisance theory on the prospect of sale to abutters, on the reproduction cost theory, and any other theory, was received. All this evidence was stipulated into the record again at the second trial and was before the Court of Appeals, and is now here. At the second trial the claimants again had an opportunity to offer

supplementary evidence on their theories, and proffered none which was rejected. If they had more, it should have been offered, as the case still awaited review in the Court of Appeals.

When the Appellate Division on the first appeal (229 App. Div. 617) considered the rule to be applied, it did not at once conclude that the adjudicated value at the date of acquisition of the easements was the legal measure of compensation for them. It first considered the evidence and by a novel application of the theory of "unjust enrichment" concluded that it would be unfair to give the property owners the benefit of demolition of the spur without requiring them to pay something to the Railway Company. It then said:

> "We find, therefore, that these rights should be valued at the time of taking at *not less* than upon the basis judicially determined as their value at the time of their acquisition." (Italics ours.)

The property owners and the City have always questioned and still question the soundness of the court's reasoning in thus arriving at a minimum valuation of the easements. We think this method of arriving at a *minimum* value was arbitrary, but it operated to the advantage of the claimants and not to their injury.

The Appellate Division then proceeded, saying:

> "The question then arises, should they be valued at a greater sum?"

The court then considered all the evidence, discussed the nuisance value theory, the prospect of sale

to the abutters, which it labeled as a "hypothetical possibility", and on the whole record determined that the value of the easements to the Railway did not exceed the adjudicated value at date of acquisition. It then held that adjudicated value should be the basis of compensation. This is a very different thing than the petitioners assert that the court did.

When the case reached the Court of Appeals that court did not conclude as a matter of law that the adjudicated value was the measure of the value of the easements to the Railway Company. It had the whole record before it and nowhere in its opinion does it announce any such rule. It discussed all phases of the case, including market value, and concluded that "on the whole, a fair valuation of the property taken is the amount awarded by the Appellate Division".

As the Court of Appeals had before it all the evidence on all theories and has stated that it has reached its conclusion on the whole record, there is no fair basis for the claim that it adopted a fixed rule that as a matter of law the adjudicated value of the easements constitute both the minimum and the maximum for their valuation at the date of the condemnation.

But if we are wrong about this, it does not follow that this Court must hold that there was a denial of due process, as all the proffered evidence on any theory which may be considered the right one is before this Court. It cannot say that due process was denied if on examination of the record it does not conclude that the amount awarded was clearly inadequate on the right theory. As we have pointed out, if the value of the easements, determined in the light of the prospect of a sale to abutters, is to be considered, the findings and evidence wholly fail to substantiate the claim that a greater value than was awarded was definitely disclosed. The decisions of this

Court above cited show that mere error does not constitute a denial of due process. As this Court has said at this Term in *West Ohio Gas Co.* v. *Public Utilities Comm., supra* (January 7, 1935), in a rate case involving the due process question, coming from a state court, the inquiry here is "whether the action of the state officials in the totality of its consequences" has resulted in confiscation, and if not "there is no denial of due process, though the proceeding is shot through with irregularity or error".

V.

On any theory of valuation open on this record, the railway franchise had no value and the elevated structure had only a scrap value.

As this Court must accept the findings of the state courts, supported by abundant evidence, that the spur was no longer a public convenience and necessity, and that as a result of changed conditions and new methods of transportation, the spur had permanently ceased to produce sufficient revenue to the system as a whole, to pay its operating expenses and its continued operation was a constant drain on the earnings of the whole system, the reproduction cost basis must obviously be discarded. Where a railway branch or spur is a useful property contributing business to a system and producing some net return, or in a rate case even where not profitable *but nevertheless required to be operated as a convenience to the public,* the reproduction cost, less depreciation, is pertinent. As an operating property this spur was a liability and not an asset. Under these special conditions, as we have pointed out, only two theories

of valuation are open to choice. One is the theory which rejects the nuisance value of the easements, and on that basis the spur had no value for operation and its only value was that to be derived from the sale or disposition of what remained after demolition. On this theory the franchise had no value and the elevated structure only a scrap value.

The only other theory of valuation possible on this record, and it is the one advanced by the dissenting opinion in the Court of Appeals and urged in the petition for certiorari, and now relied on by petitioners, is that the easements had a value to the Railway Company on the nuisance theory, which is a value based on the possibility of obtaining a price from the abutting owners. The latter theory presupposes that the property owners would be paying for the demolition of the road. They would not acquire it with a view to operation. If the nuisance theory is adopted and the easements in the hands of the Railway Company are valued at the amount the property owners would have paid, that award by the very principles on which it is based embraces full compensation to the Railway Company for removal of its structure. Once the value of the easements for sale to the abutters is ascertained and awarded, the result is the demolition of the structure, so that on this theory, as well as on the first one, the structure has only a scrap value and the franchise none.

It is obvious, therefore, that on any theory of valuation which could be supported by this record, the New York courts were right in giving the franchise no value and the structure a scrap value. The amount of $235 awarded as the scrap value of the structure takes into account the fact that the City paid for the demolition.

The petitioners contend that the courts below did not include the "adjudicated value" of the Depew Place easement. This is an intersecting street. Good reasons were given below for not including this frontage in the computation (R. 335). In any event this is merely a claim of error. For the exclusion of this item to constitute a denial of due process, it must still appear that the total award was clearly less than the total value with Depew Place included.

CONCLUSION

No complaint is made that the judicial machinery provided by New York for ascertaining just compensation was inadequate. The New York courts have given painstaking consideration to all the petitioners' claims. The burden of proof was on the claimants in the courts below to show value, and it rests upon them here to show denial of due process. The case presented novel and difficult questions of law and fact. No conclusion adverse to the petitioners which the New York courts reached on any of these questions was unfair or without support in reason and in the evidence. If this Court were to approach the legal questions as to the measure of compensation under the peculiar facts of this case in its own way and on its own views of the law, it could not say that the value of this spur to the Railway Company was clearly more than the sum awarded. When this elevated system was built the investors took the hazard that as years passed the system, in whole or in part, might become unprofitable. That condition developed in respect of this spur. On the other hand, the property owners had the chance that their property would improve in value if conditions forced the company to abandon its structure. The New York

courts, faced with decisions which logically led to the conclusion that the spur was valueless in the hands of the Railway Company, and with no satisfactory proof of market value on the nuisance or any other theory, have nevertheless insisted against the protests of the property owners in making the latter share the losses resulting to the Railway Company from business hazards. This has been done by a novel and questionable application of the rule against what has been called "unjust enrichment", which the respondents would now be hopefully assailing if this Court had jurisdiction under section 237(b) of the Judicial Code, to issue a cross writ of certiorari. The company has been awarded at least all that this spur cost, and probably more, notwithstanding it had become valueless for the purpose for which it was built and authorized to be used. There was no denial of due process.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 546.—October Term, 1934.

William Roberts, as Receiver of the Manhattan Railway Company, et al., Petitioners, *vs.* The City of New York, et al., Respondents.	On Writ of Certiorari to the Supreme Court of the State of New York.

[April 29, 1935.]

Mr. Justice Cardozo delivered the opinion of the Court.

The 42nd Street spur of the elevated railroad system in the City of New York has been condemned for the purpose of demolition in proceedings duly instituted by officials of the city government. The fee owner of the spur, a receiver, a lessee, and trustees under mortgages are dissatisfied with the award of damages. The question is whether property interests have been taken without compensation in violation of the restraints of the Fourteenth Amendment.

The length of the demolished structure was about nine hundred feet. At the east it was connected with the elevated station at 42nd Street and Third Avenue. At the west it had a terminal on Park Avenue opposite the Grand Central Station. For a number of years traffic upon the spur had been dwindling, especially so since the completion of the subways, receipts being less than the cost of operation. Traffic became so light that the spur ceased to contribute value to the business of the railroad, either as an independent unit or as a feeder to the system. With these developments a movement to take the structure from the highway acquired rapid headway. Travelers on 42nd Street, afoot or in vehicles, were impatient of obstructions that had ceased to be useful. Lot owners, contiguous to the railway and nearby, looked forward with eagerness to the removal of an unsightly edifice in the expectation of enhancing the value of their lots. The city too had an interest in the growth of taxable values as well as in the promotion of the safety of the streets. In 1919, the legislature

of New York came to the relief of city, lot owners and travelers through the adoption of a statute. By Chapter 611 of the Laws of 1919, the Public Service Commission was empowered to determine whether the spur and its appurtenances were "necessary and convenient for the public service, or whether, even if necessary and convenient, such tracks, structure, station and appurtenances" constituted "an impediment or obstruction to the public street." Upon the certificate of the Commission as to the existence of either of these conditions, the city might condemn "the rights, easements and franchises of the said Manhattan Railway Company" through appropriate proceedings. See also L. 1923, c. 635.

At the end of a full hearing the Public Service Commission found and certified that the spur was no longer a public convenience and necessity, and also that it was an impediment and obstruction to the public use of the street. No appeal to the courts was taken by the company. Thereupon, the City of New York by its Board of Estimate and Apportionment resolved that condemnation proceedings should be begun. The resolution, adopted November 23, 1923, called for the condemnation of the structure of the spur and of all easements and franchises appurtenant thereto, title to vest in the city on December 7 of that year. The resolution was followed by a suit under the applicable statute for the determination of the damages to be paid to the owners of the property condemned. The trial court made an award in the sum of $975,438, with interest, stating the component items in an opinion. 126 Misc. (N. Y.) 879. Cross-appeals followed to the Appellate Division of the Supreme Court, the city and abutting lot owners insisting that the award was too high, and the spur owner and its allies insisting that the damages were too low and that property had been taken without due process of law: *United States Constitution, Fourteenth Amendment.* Three items were in controversy: (1) the value of the franchise; (2) the value of the structure; and (3) the value of certain rights or privileges characterized as private easements. As to item (1), the ruling of the Appellate Division was that the franchise was without value, and had become a source of loss instead of gain; as to item (2), the ruling was that the structure was without value beyond what it would be worth as scrap when taken down; and as to item (3), the ruling was that the private easements must be paid for at not

less than their value as judicially determined at the time of their acquisition, but that the evidence did not justify a finding that their value was any greater. *Matter of City of New York* (Manhattan Railway Co.), 229 App. Div. 617. The cause was remitted to the trial court, which heard additional evidence and made a new decree. As a result of that decree the value of the private easements was fixed at $539,117.41; the scrap value of the structure was fixed at $235; the value of the franchise nothing. 143 Misc. (N. Y.) 129. There were cross-appeals to the Appellate Division, which affirmed without opinion (238 App. Div. 832), and then to the Court of Appeals, where there was an affirmance by a divided court. 265 N. Y. 170. This court granted a writ of certiorari at the instance of the Receiver of the railway company and those allied with him in interest. 293 U. S. 554.

A statute of New York in force at the taking of the spur directs the court to "ascertain and estimate the compensation which ought justly to be made by the City of New York to the respective owners of the real property to be acquired." Charter of New York City, § 1001; L. 1915, c. 606. Cf. L. 1923, c. 635. Such a system of condemnation is at least fair upon its face. "If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages." *McGovern* v. *City of New York*, 229 U. S. 363, 370. Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. In condemnation proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 70. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of abritrary action. The test has been differently phrased by different judges and in different contexts. At times we find the statement that the Constitution is not infringed unless there has been "absolute disregard" of the right of the owner to be paid for what is taken. *C. B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 246; *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 565; *Appleby* v. *Buffalo*, 221 U. S. 524, 532. At other times we are told that due process is not lacking unless "plain rights" have been ignored,

with a reminder that much will be overlooked when there is nothing of unfairness or partiality in the course of the proceedings. *McGovern* v. *City of New York, supra,* at p. 373. From the very nature of the problem these phrases and others like them are approximate suggestions rather than scientific definitions. In last resort the line of division is dependent upon differences of degree too subtle to be catalogued. *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355; *Klein* v. *Board of Supervisors,* 282 U. S. 19, 23. Cf. *Davidson* v. *New Orleans,* 96 U. S. 97, 104. One cannot hope to mark its bearings in a sentence or a paragraph. Enough for present purposes that when the hearing has been full and candid, there must ordinarily be a showing of something more far-reaching than one of dubious mistake in the appraisal of the evidence. Due process is a growth too sturdy to succumb to the infection of the least ingredient of error. "It takes more than a possible misconstruction by a court to make a case under the Fourteenth Amendment." *Seattle, Renton & So. R. Co.* v. *Linhoff,* 231 U. S. 568, 570.

In the setting of this background we approach the consideration of the rulings that are here assigned as error.

1. First in importance is the appraisal of the private easements. The franchise to maintain an elevated railway "with an interest in the street in perpetuity" (*People* v. *O'Brien,* 111 N. Y. 1, 38) dates from September 7, 1875. After the building of the road controversies developed between the company and abutting owners. Out of them grew what came to be known as the elevated railroad lawsuits, "one of the most important and interesting chapters in the history of litigation" in New York. *Powers* v. *Manhattan Railway Co.,* 120 N. Y. 178, 183. The foundation stone was laid by the Court of Appeals in *Story* v. *New York Elevated Railroad Co.,* 90 N. Y. 122, decided in 1882. The doctrine was there announced that appurtenant to lots abutting on a highway are certain private easements—easements of light and air and access—which may not be destroyed or impaired through the construction under legislative sanction of an elevated railroad without payment to the lot owners of the damage to their land and buildings. Many later cases enforced the same doctrine and indeed enlarged its scope, applying it to lots where the fee of the highway was vested in the city. *Lahr* v. *Metropolitan Elevated R. Co.,* 104 N. Y. 268; *Kane* v. *New York Elevated R. Co.,* 125 N. Y. 164. Cf.

Muhlker v. *N. Y. & H. R. Co.*, 197 U. S. 544; *Sauer* v. *City of New York*, 206 U. S. 586. In submission to these holdings the Manhattan Railway Company extinguished the damage claims of lot owners along many miles of track. It did this by purchase or condemnation or proceedings equivalent thereto, the amount to be paid being determined sometimes by a court, sometimes by agreement. Generally the extinguishment took the form of grants of the easements to the extent that they were affected by the then existing structure, the abutting owners being the grantors and the Manhattan the grantee. Irrespective of the form, the substance of the transaction was that "the railroad merely exhausted the right of the abutting owners to complain because the railroad was in the street and so trespassing on their property." Per Pound, Ch. J., in the present case, 265 N. Y. at p. 180. What was conveyed was the right to persist in a course of conduct that otherwise would have been a wrong. Even then the process of condemnation or its equivalent did not so obliterate the easements as to leave abutters helpless in the face of new encroachments. If the user was substantially aggravated, as, for example, by an added tier of tracks, there was another right to be extinguished. *Knoth* v. *Manhattan R. Co.*, 187 N. Y. 243; *American Bank Note Co.* v. *New York Elevated R. Co.*, 129 N. Y. 252, 266. The company was under a continuing duty to rid its presence in the highway of the character of a trespass as against the title of abutters.

Whether these rights or interests, though easements in the ownership of the abutters, retained the same quality after release or conveyance to the railway, we do not now determine. They are spoken of in many cases as if their quality in the new ownership continued what it was before. See, e. g., *People ex rel. Manhattan R. Co.* v. *Barker*, 165 N. Y. 305; *People ex rel. Manhattan R. Co.* v. *Woodbury*, 203 N. Y. 231. This may have been merely for convenience with the thought that the description was at least sufficiently accurate to serve the case at hand. Elsewhere the same interests are spoken of as "quasi-easements" (*American Bank Note Co.* v. *New York Elevated R. Co.*, *supra*, at p. 272) or by some other and equivalent term. *Matter of City of New York* (*Manhattan R. Co.*), 126 Misc. 879, 901; 229 App. Div. 617, 625; *Stevens* v. *New York Elevated R. Co.*, 130 N. Y. 95, 101. After acquisition by the railway, they are not susceptible of separation

from the ownership of the franchise. *Kernochan* v. *New York Elevated R. Co.*, 128 N. Y. 559; *Drucker* v. *Manhattan R. Co.*, 213 N. Y. 543; *Heard* v. *City of Brooklyn*, 60 N. Y. 242.* They are not easements in gross assignable to strangers generally. 265 N. Y. at p. 181. They may be factors to be considered in determining the value of the franchise while the road is in operation, for they are effective as a release from liability for past or future damages. This is very far from saying that they contribute elements of value when operation has been proved to be impossible except at a continuing loss. Still less does it connote a value equivalent to the estimated present cost of condemning them anew.

We have said that there will be no attempt in this court to classify the rights acquired by the company as easements or as something else. For present purposes we accept the ruling of the state court that irrespective of their precise nature they had a value to be paid for upon the termination of the franchise and the removal of the structure by force of eminent domain. If all this be assumed, the petitioners fall short by a long interval of making out a defiance of constitutional restraints. Their argument, it seems, is this: property that is to be condemned must be paid for in accordance with the value at the time of the taking; these easements when acquired about half a century ago had a value then judicially determined of about half a million dollars; owing to changes in the neighborhood the same easements, if acquired in 1923, would have cost $3,600,000; an award has been made for the first amount only; the difference between the first amount and the second is an increment of value condemned without requital.

The argument misconceives the action of the courts below. The courts have not held that an increment of value in the easements or in anything else may be condemned without requital. What they have held is merely this, that there is no basis in the evidence for assigning any determinate value to the ownership of the easements in excess of the value belonging to them when they were acquired by the company. Even if there was error here in the interpretation of the record, it was not so gross or obvious as to justify a holding that the restraints of the Constitution were forgotten or ignored. But in truth there was no error, or none to the prejudice of the owners of the property condemned. Much

*Many decisions are collected in 40 Yale Law Journal 779, 1074, 1309.

could be said in support of the position that the value of the so-called easements was nothing more than nominal. If so, the petitioners have been overpaid by more than half a million dollars. We do not go into that question now, for the city and the abutters are not petitioners in this court, and must acquiesce in the award as made. Problems open in the state court and there considered in the opinions (see especially the dissenting opinion in 265 N. Y. at p. 183) are beyond our jurisdiction here. Enough for present purposes that the award is not too low, though perhaps it is too high. Excess is not an error of which the owner may complain.

Too low it certainly is not. "The question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *City of Boston*, 217 U. S. 189, 195; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. If we assume these easements to be property, what were they worth to the railway in 1923? The petitioners do not urge that it was practicable to find a buyer who would pay for the easements in connection with the franchise and with a view to continuing the operation of the road. The spur had proved to be a failure, a mere impediment to public travel. Substantial prices are not paid for the privilege of conducting a business at a loss. The petitioners do urge, however, that abutters would have been willing to pay for an abandonment of the road, and that such abandonment would have been equivalent to the surrender of the easements or to a deed of reconveyance. Voluntary abandonment was permissible (New York Railroad Law, § 237; also L. 1917, c. 788) until the franchise with its appurtenances was taken over by the city. From this the conclusion is drawn that the easements are worth what the abutters would have paid for them. Implicit in such an argument are assumptions that would be worthy of scrutiny if the need for scrutiny were here. The inquiry would then be whether easements or quasi-easements inseparable from a franchise must be paid for as property at the peril of infringing the Fourteenth Amendment when their value for sale presupposes the abandonment of the franchise to which they are appurtenant. To carry the Amendment to that point approaches, though it may not touch, the acceptance of the nuisance value which Hough, J., on one occasion excluded from the reckoning with words of trenchant emphasis. *Consolidated Gas Co.* v. *City of New York*, 157 Fed. 849, 874. For the time being

and provisionally we put aside these doubts, resolving in favor of the company whatever problems they suggest. Granting that the value of the easements is whatever abutters would have paid for a surrender of the franchise, how much would this have been?

A sale to abutters was impracticable unless all or nearly all united. One owner could gain nothing from a reconveyance of the easements appurtenant to his lot without a like reconveyance to others along the line of the invading structure. The spur would have to come down altogether or not at all. The notion is almost fantastic that there would have been union among the owners upon a price of $3,600,000 or any comparable figure. Even if the value of their lots were to be enhanced to that extent, they would be no better off as the outcome of the bargain than they already were without it, and would be risking a huge outlay. They would be doing this though they denied that the easements were the kind of property for which they could be forced to pay a dollar if the case were brought into a court. In such circumstances union among the abutters was a shadowy and distant chance. *City of New York* v. *Sage*, 239 U. S. 57, 61; *Olson* v. *United States*, 292 U. S. 246, 256. "What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots." *City of New York* v. *Sage*, *supra*, at p. 61. Discordant voices among the group would surely have been raised in protest if an attempt had been made by amicable treaty to get rid of the spur at the value put upon it by the railway. Perhaps the abutters would have paid something. But how much would it have been? The courts below have found in the evidence no basis for the belief that the price would have exceeded the value of the easements as judicially ascertained at the time of acquisition. 229 App. Div. at p. 629; 265 N. Y. at p. 181. We cannot say that this was error. Still less can we say that some other and higher figure was established with such persuasive power that the Constitution of the United States has been flouted in the refusal to accept it.

2. Objections are made by the petitioners to the valuations of the structure, the franchise, and the public easements in the highway.

The structure was appraised as junk, the city having undertaken to bear the cost of removal. Such an appraisal might be too low were it not for the award for the private easements. To realize the value of those easements, an abandonment of the spur was necessary. "The railroads could not release their rights to the abutting owners and continue to operate their railroads in the street." 265 N. Y. at p. 181. The structure in the circumstances had no value except as scrap.

The franchise was without value for reasons already stated, or so the triers of the facts might hold without departing from the restraints of the Constitution of the nation.

With the value of the franchise gone, the public easements in the street as distinguished from the private ones had a worth that was merely nominal, at least for any showing to the contrary in the pages of this record.

Other objections have been considered without inducing a conviction that the petitioners have been the victims of any arbitrary rulings.

The judgment is

Affirmed.

The CHIEF Justice took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.